IN THE SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington, Respondent, v. Allen Eugene Gregory, Appellant.	NO. 71155-1 EN BANC filed November 30, 2006

Bridge, J.—This case involves two consolidated appeals brought by Allen Eugene Gregory. In 2000, Gregory was convicted of three counts of first degree rape for the 1998 rape of R.S (rape case). In 2001, Gregory was convicted of the 1996 aggravated first degree murder of G.H., committed in the course of a rape and robbery (murder case). The jury in the murder case determined that there were not sufficient mitigating circumstances to merit leniency, and Gregory was sentenced to death. Gregory now appeals the convictions and sentences in both cases.

For reasons set forth below, we reverse the rape convictions, holding that the trial court abused its discretion when it declined to review in camera the dependency files of the victim's child for evidence relevant to Gregory's consent defense. Those files reveal information that we have determined would have been material to Gregory's defense, and nondisclosure was not harmless beyond a reasonable doubt. We find no other trial court error in the rape case. We further conclude that none of Gregory's arguments warrant reversal of the aggravated first degree murder conviction, and we affirm that conviction. However, we find that the prosecutor engaged in misconduct during closing arguments in the penalty phase of the murder trial. Because the rape convictions were relied upon in the penalty phase of the murder case and because we find that prosecutorial misconduct occurred in the penalty phase, we reverse the death sentence, and we remand to the trial court for resentencing in the murder case.[1]

I. Rape of R.S.

A. Rape Case Statement of Facts and Procedural History

In 2000, Gregory was convicted of three counts of first degree rape for the 1998 rape of R.S. R.S. testified that at about 1:30 a.m. on August 21, 1998, as she was walking home, she noticed a car that she thought belonged to a friend. She approached the car. The occupant, whom she later identified as Gregory, rolled

[1] The following abbreviations will be used throughout this opinion: RCP — Rape Case Clerk's Papers; RRP — Rape Case Verbatim Report of Proceedings; MCP — Murder Case Clerk's Papers; MRP — Murder Case Verbatim Report of Proceedings.

down the window. When she discovered the driver was not her friend after all, R.S. explained, "'I thought you were somebody I knew.'" RRP at 2047. Gregory asked R.S. if she needed a ride home and after some hesitation, she accepted.

Instead of taking R.S. home, Gregory took her to a parking lot behind a nearby middle school. R.S. testified that he pulled out a knife and insisted that R.S. "give him what he wanted." RRP at 2052. She tried to escape but Gregory held her by the hair and held the knife to her side. R.S. testified that Gregory forced her to perform oral sex at knifepoint. He then put on a condom and vaginally raped her, holding the knife to her nose and threatening to cut it off. Afterward, R.S. noticed that the condom had broken. R.S. testified that she screamed and tried again to get out of the car, but Gregory punched her. Gregory then repeatedly forced her to have anal intercourse. Afterward, he opened the door and pushed her out of the car.

As Gregory pulled away, R.S. testified that she memorized his license plate number. She then ran to a convenience store for help. The police were called and R.S. was taken to the hospital. She reported that Gregory had told her that his name was Allen. She also described the car and gave the police the license plate number. She explained that as the rapes occurred, she tried to memorize details about the interior of the car, which had several distinctive features. R.S. did not get a good look at her assailant's face because she was turned away from him during most of the assault.

The hospital staff photographed R.S.'s injuries, including scratches and

bruises to her arm, legs, and back, as well as bruises and welts on her head and face. They also took swabs from R.S.'s skin, vagina, anus, and mouth. Semen was collected from the vaginal swabs and a deoxyribonucleic acid (DNA) profile of the assailant was generated from that semen.

Detectives identified Gregory as the owner of the car whose license plate R.S. had memorized. Officers located the car and looked in from the outside to confirm the specific characteristics described by R.S. After doing so, they arrested Gregory.

Shortly after his arrest, Gregory denied ever having had any contact with R.S., claiming he had an alibi. Police obtained a warrant and searched Gregory's car, where they found a Buck knife and a condom. The condom had the same lot number and expiration date as a condom wrapper found in the parking lot where the incident occurred. The Washington State Patrol Crime Laboratory (WSPCL) also compared the rape kit seminal fluid with a sample of Gregory's blood and concluded that there was a DNA match. The chance of a random match in the African American population was 1 in 360 million.

Before trial, Gregory changed his defense to one of consent, asserting that he had indeed had sex with R.S., but the encounter was consensual. In aid of his new defense, he sought to introduce evidence of R.S.'s prior convictions for prostitution. However, the trial court concluded that her prior convictions for prostitution were too remote in time to be relevant and excluded them. Gregory then asked the trial

court to conduct an in camera review of the Child Protective Services dependency files of R.S.'s children to determine whether the files contained any evidence of recent (and therefore relevant) evidence of prostitution. The trial court denied this request.

At trial, Gregory testified that R.S. had approached his car and offered to have sex with him for money. He testified that she willingly accompanied him to the middle school parking lot and that they engaged in consensual sex. He explained that R.S. became upset and demanded more money when she discovered that the condom had broken. When he refused, she became irate, and he told her to get out of the car. Gregory was never asked to provide, nor did he offer any explanation for R.S.'s injuries. The defense theory was that she accused Gregory of rape in retaliation.

The jury found Gregory guilty of three counts of rape in the first degree. At sentencing, the trial judge concluded that counts one (forced oral intercourse) and two (forced vaginal intercourse) were the same criminal conduct, but count three (forced anal intercourse) constituted separate criminal conduct. The sentences for counts one and two would be served concurrently, but the sentence for count three would be served consecutively. Gregory was also sentenced for a deadly weapon enhancement for each count. His sentence amounted to 331 months (27½ years) of total confinement. Gregory appealed both the rape convictions and his sentence.

After oral argument in this case, a majority of the court concluded that the

trial court had erred by refusing to conduct in camera review of R.S.'s children's dependency court files. We issued an order remanding to the superior court for in camera review of the relevant dependency files that were pending at the time of the rape trial. The superior court entered findings of fact and conclusions of law finding that the dependency files of one child contained information relevant to the case. This court requested additional briefing from the parties as to whether the information revealed by the in camera review required reversal of the rape convictions. Such briefing has since been submitted to this court.

B. Rape Case Analysis

Evidence Excluded Pursuant to Washington's Rape Shield Statute

Gregory's theory of the case was that R.S. consented to oral and vaginal sex with him in exchange for money, but she demanded more money when she discovered that the condom had broken. When he refused, they argued and he kicked her out of his car; then, she fabricated the rape story to retaliate. Gregory asserts that he should have been allowed to present evidence of R.S.'s prior prostitution activities to support this theory. Washington's rape shield statute provides, in part:

> Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility *and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section* . . . .

RCW 9A.44.020(2) (emphasis added). Subsection (3) provides that evidence of the

victim's past sexual behavior (as described above) is admissible on the issue of consent *only* if specific procedural requirements are met. RCW 9A.44.020(3). The statute requires a written offer of proof that a victim's prior sexual history is relevant to the issue of consent. Then, if the trial judge finds the offer of proof to be sufficient, the court must order a hearing outside of the presence of the jury. RCW 9A.44.020(3)(a). At the conclusion of the hearing, if the court finds that evidence offered is relevant to the issue of the victim's consent, that its probative value is not substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice, and that its exclusion would result in denial of substantial justice to the defendant, the court is required to enter an order stating what evidence may be introduced by the defendant. RCW 9A.44.020(3)(d). This court has read RCW 9A.44.020 to mean that "credibility is ruled out altogether as the basis for introducing past sexual conduct and consent is made a suspect justification for the introduction of such evidence." *State v. Hudlow*, 99 Wn.2d 1, 8, 659 P.2d 514 (1983). Even so, if the State opens the door in its case in chief by presenting evidence tending to prove the nature of the victim's past sexual behavior, then the defense may cross-examine the victim on the subject. RCW 9A.44.020(4).

In this case, R.S. had prior convictions for sexual misconduct in 1992 and prostitution in 1995. Gregory presented evidence of these convictions to the trial judge in an offer of proof pursuant to RCW 9A.44.020(3).[2] The trial judge

[2] The trial court refused to consider evidence of other arrests for sexually related crimes because no convictions resulted, finding that mere arrests were not probative.

determined that Gregory did not meet the threshold relevance requirement necessary to justify a full hearing on admissibility of the evidence. The trial court ruled that the 1992 and 1995 convictions were too remote in time from the 1998 incident to be relevant. Even though the defense offered a declaration from David Moon, a friend of R.S.'s, that R.S. admitted that she was engaging in prostitution in 1998, the evidence offered was based at least in part on hearsay, and the trial court did not find Moon's testimony to be credible. Therefore, there was insufficient evidence to warrant a hearing under the rape shield statute.

The trial court did allow the defense to interview R.S. again and inquire into whether she had engaged in prostitution activity on the streets of Tacoma between 1995 and 1998. In that interview, R.S. admitted to working as a prostitute through an escort service in 1996 and early 1997 but denied any prostitution activity in 1998. She denied any streetwalking activity after 1995. After the interview, the trial court again refused to admit any evidence of R.S.'s prostitution activity because it was too remote in time and the factual circumstances were not similar enough to this incident to make the history relevant. However, Gregory was permitted to argue that R.S. was acting as a prostitute on the night of her encounter with Gregory.

Evidence of Prior Acts of Prostitution Generally: Gregory first argues that the trial court erred in excluding evidence of R.S.'s prior acts of prostitution because he claims that prior prostitution activities are not governed by the rape shield statute

at all. In a related argument, Gregory contends that even if the rape shield statute applies to prior acts of prostitution, it should be interpreted to *always* allow admission of those acts. One purpose of the rape shield statute is to promote the reporting and prosecution of rapes. *Hudlow*, 99 Wn.2d at 16. According to Gregory, this purpose is not undermined by the revelation at trial of prior prostitution convictions because such convictions are already a matter of public record. Therefore, there is little risk that the victim will be unduly harassed or embarrassed by the introduction of such evidence.

However, Gregory acknowledges but then ignores a related purpose that is evident from the plain language of RCW 9A.44.020(3)(d)—to eliminate prejudicial evidence that has little, if any, relevance to the issues of credibility or consent. The statute clearly contemplates that where there is a substantial danger of undue prejudice to the truth finding process, such evidence will be excluded. *Hudlow*, 99 Wn.2d at 16. Such prejudice might occur if the victim's past sexual conduct "confuse[s] the issues, mislead[s] the jury, or cause[s] [it] to decide the case on an improper or emotional basis." *Id.* at 14. Because the introduction of prior acts of prostitution could create substantial prejudice to the truth finding process, we decline the defendant's invitation to make a sweeping ruling that the rape shield statute does not apply to prior acts of prostitution.[3]

[3] Gregory cites to two cases to support his argument that the rape shield statute should not apply to acts of prostitution. *See State v. Johnson*, 121 N.M. 77, 908 P.2d 770, 775 (1995); *Drake v. State*, 108 Nev. 523, 836 P.2d 52, 55 (1992). The New Mexico case was later overruled by that state supreme court. *State v. Johnson*, 1997-

Gregory next points to other state courts that have allowed evidence of prior prostitution under rape shield laws. However, many of these cases reflect a case by case evaluation of the trial court's exercise of its discretion, rather than a sweeping rule. *See*, *e.g.*, *State ex rel. Pope v. Superior Court*, 113 Ariz. 22, 545 P.2d 946, 953 (1976) (contemplating an exception to the rape shield law for prior prostitution activities, but allowing admission only after a hearing shows the evidence is credible and not too remote); *State v. Williams*, 21 Ohio St. 3d 33, 487 N.E.2d 560, 562-63 (1986) (allowing evidence of the victim's prior acts of prostitution to rebut the victim's testimony on direct examination that she *never* consents to sex with men). Other courts have properly rejected this sweeping argument, noting that a woman who has worked as a prostitute is able to refuse consent to have sexual intercourse. *See*, *e.g.*, *Brewer v. United States*, 559 A.2d 317, 321 (1989) ("In short, it cannot be assumed that prostitutes will accept every opportunity that comes along to engage in sexual relations. The fact that a woman is a prostitute . . . has nothing to do with whether she consented to sexual intercourse with a particular defendant."). We also decline the defendant's invitation to conclude that prior prostitution activity is always admissible under the rape shield statute. Trial courts must evaluate the admissibility of prior acts of prostitution on a case by case basis under RCW

NMSC-36, 123 N.M. 640, 944 P.2d 869, 879, 881 (1997) (requiring a case by case evaluation of relevance). Moreover, other state courts have applied their rape shield statutes to exclude evidence regarding prior acts of prostitution where those acts were not relevant. *See, e.g., Commonwealth v. Jones*, 2003 Pa. Super. 220, 826 A.2d 900, 909 (2003); *Commonwealth v. Houston*, 430 Mass. 616, 722 N.E.2d 942, 945-46 (2000).

9A.44.020.

Application of the Rape Shield Statute in this Case: Gregory argues that even if the rape shield statute applies, and even if prior acts of prostitution may be excluded under the statute in some cases, the trial court erred by excluding evidence of R.S.'s prior prostitution in this case.

The admissibility of evidence of past sexual conduct is within the sound discretion of the trial court. *Hudlow*, 99 Wn.2d at 17-18. As set forth earlier, according to the procedure adopted in RCW 9A.44.020(3), the defendant must provide a written offer of proof to establish the relevance of the prior sexual conduct. If the defendant's offer of proof does not establish relevance, then the trial court is not obligated to set a hearing to determine whether the other two prongs of the rape shield test are met. *Id*. In this case, the trial court concluded that the defendant's offer of proof was not sufficient to establish relevance, so the trial court did not proceed to a hearing on the issue.

This court has concluded that the rape shield relevancy inquiry must be whether, under ER 401, "the [victim's] consent to sexual activity in the past, without more, makes it more probable or less probable that [he or] she consented to sexual activity on this occasion." *Hudlow*, 99 Wn.2d at 10. "Factual similarities between prior consensual sex acts and the questioned sex acts claimed by the defendant to be consensual would cause the evidence to meet the minimal relevancy test of ER 401." *Id.* at 11. However, the factual similarities must be particularized,

not general. *Id.* "For instance, if a [victim] frequently engages in sexual intercourse with men shortly after meeting them in bars, this would have some relevancy if the defendant claims she consented to sexual intercourse with him under similar circumstances." *Id.* Similarly, in *State v. Morley*, 46 Wn. App. 156, 730 P.2d 687 (1986), the Court of Appeals did not take issue with the trial court's ruling allowing a witness to testify that, shortly before the incident with the defendant, the victim had offered the witness sex in exchange for $40 in circumstances very similar to the defendant's version of events. *Id.* at 159-60.[4]

In the instant case, the trial court concluded that R.S.'s prior convictions for prostitution and sexual misconduct were too remote in time and too different in character to be relevant and nothing suggested that R.S. was prostituting herself in 1998. In her interview with defense counsel, R.S. admitted to having worked for an escort service in 1996 and early 1997, but such activity is not factually similar to Gregory's account of the incident in question. R.S. denied streetwalking after 1995, but R.S.'s encounter with Gregory did not occur until late August 1998. The Court of Appeals has recognized that in the context of determining the relevance of a victim's prior sexual conduct, questions of remoteness are matters within the sound discretion of the trial court. *State v. Kalamarski*, 27 Wn. App. 787, 790, 620 P.2d 1017 (1980).[5] The trial court did not abuse its discretion in excluding R.S.'s prior

[4] The *Morley* court also determined that the trial court did not abuse its discretion when it excluded hearsay testimony from a separate witness claiming that the victim had reported engaging in prostitution to raise money in the past. *Morley*, 46 Wn. App. at 159-60.

convictions where at least two years separate the defendant's prior streetwalking conduct and the incident in question.

Because all three prongs of the statutory test must be met to justify admission of such evidence, and Gregory has failed to show that the trial court abused its discretion with regard to its ruling on relevance, we need not evaluate whether the second and third prongs of the statutory test are met. *See* RCW 9A.44.020(3).[6]

Opened Door: Gregory also asserts that he should have been allowed to cross-examine R.S. regarding her prior prostitution because the State opened the door to admission of that evidence. RCW 9A.44.020(4) provides that

> Nothing in this section shall be construed to prohibit cross-examination of the victim on the issue of past sexual behavior when the prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior, but the court may require a hearing pursuant to subsection (3) of this section concerning such evidence.

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[5] While the concurrence claims remoteness should be a matter of weight, not admissibility, none of the cases it cites involves the question of relevance under the rape shield statute. In addition, some of those cases in fact stand for the opposite proposition, namely that remoteness impacts admissibility. *See, e.g., State v. Morgan,* 146 Wash. 109, 113, 261 P. 777 (1927) (discussing with approval a Connecticut case that recognized that remoteness *may* be a controlling factor supporting exclusion of evidence); *United States v. Brito,* 427 F.3d 53, 64 (1st Cir. 2005) (considering remoteness as a factor when determining admissibility under Federal Rule of Evidence 609). Others emphasize that whether evidence is too remote to be relevant is within the discretion of the trial court. *See, e.g., State v. Harold,* 45 Wn.2d 505, 510, 275 P.2d 895 (1954).

[6] Gregory seems to argue that his Sixth Amendment and article I, section 22 rights were violated by the application of the rape shield statute in this case because he was denied an avenue for proving his consent defense. However, this court has already held that application of RCW 9A.44.020 to prevent the introduction of irrelevant evidence does not violate any constitutional right to argue a consent defense. *Hudlow*, 99 Wn.2d at 15 ("Of course, a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense."). While Gregory argues that we must overturn *Hudlow* in light of *Olden v. Kentucky*, 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988), that case discusses a defendant's right to present *relevant* evidence regarding the victim's motive to lie, *id.* at 232, not a right to present irrelevant evidence.

In *State v. Camara*, 113 Wn.2d 631, 642-43, 781 P.2d 483 (1989), this court discussed this subsection of the rape shield statute:

> To hold that evidence which *in any manner* concerns a rape victim's past sexual behavior affords an opportunity for cross examination about the victim's sexual past would weaken the statutory shield protecting victims from disclosures of their prior sexual conduct. We do not conceive RCW 9A.44.020(4) to be so broad. Rather, we believe it permits cross examination on a victim's sexual past only when the State's evidence casts the victim's sexual history in a light favorable to the State's case.

Id. at 643. First we note that any claim that the State opened the door during its cross-examination of Gregory necessarily fails because it does not constitute evidence presented during the State's case in chief, as required by the plain language of the statute. RCW 9A.44.020(4).

In addition, Gregory was properly allowed to argue that R.S. consented to have sex with him on the night in question in exchange for money. Therefore, there was necessarily discussion at trial about whether R.S. was acting as a prostitute *on that night*. However, this discussion can be distinguished from one of *prior* acts of prostitution. To open the door to R.S.'s sexual history, the State would have had to present that history in a favorable light. *Camara*, 113 Wn.2d at 643. Merely arguing that she was not a prostitute on August 21, 1998 would not open the door to discussion of her sexual history.

Gregory contends R.S.'s testimony on direct that she was currently in counseling at a sexual assault center cast her sexual history in a favorable light. R.S. revealed that she was in counseling in response to the State's general inquiry

into the list of people with whom she had discussed the rape. To justify the admission of the statement, the State argued, outside of the presence of the jury, that "[i]t's highly unlikely that a prostitute who is angry about a $20 prostitution deal gone awry will pay out of her own pocket to go to counseling for two years." RRP at 2080. However, the State's argument logically rebuts the consent defense—a consensual sexual encounter would not lead someone to seek sexual assault counseling. R.S.'s testimony does not speak to her sexual *history*; instead the State merely sought to contradict Gregory's version of the events on the night in question.[7]

Similarly, the State questioned R.S. about how the incident had affected her. Gregory claims that this evidence was presented to show that R.S. did not react as a prostitute would have reacted to this incident. However, the more logical conclusion is that R.S. did not react as someone who consented to a sexual encounter would act. The State's argument does not seem to implicate prostitution activities at all.

Finally, Gregory claims that the State opened the door during its closing argument when it belittled Gregory's theory that R.S. was working as a prostitute on the night in question. RRP 2923-24 ("He has got to make [R.S.] look like a prostitute, got to make her look bad."); RRP 2967 ("Allen Gregory wants you to

[7] While Gregory seems to argue that the State also opened the door with testimony that R.S. hated Gregory, this testimony occurred during an offer of proof and was never repeated to the jury.

believe that [R.S.] is a prostitute. . . . He wants you to believe that she is a prostitute who somehow got it into her head that she was angry and wanted to report this rape."). But again, these arguments refer only to the events of August 21, 1998; they do not refer to R.S.'s sexual *history*. We conclude that in its case in chief, the State did not open the door to evidence of R.S.'s sexual history.

Admission of Prior Sexual Conduct to Prove a Motive to Lie: Gregory argues the trial court should have allowed him to cross-examine R.S. about her prior acts of prostitution because doing so would allow him to establish that she had a motive to falsely accuse him of rape. According to Gregory, the trial court's refusal to admit evidence of R.S.'s prior sexual conduct violated his state and federal confrontation rights because he could not explore R.S.'s bias. The rape shield statute does not allow evidence of prior sexual conduct to be admitted on the issue of a victim's credibility under any circumstances. *Hudlow*, 99 Wn.2d at 8. Gregory acknowledges that "[o]n its face the statute strictly prohibits evidence of [R.S.'s] past sexual behavior for any issue other than consent." Appellant's Opening Br. at 61. However, Gregory argues that it is unconstitutional to apply the statute in this way, despite its plain language, if it prevents him from exposing through cross-examination R.S.'s bias or motive to lie.[8]

[8] Gregory and the concurrence also speculate that R.S. lied to avoid arrest or negative consequences in her dependency proceeding. While R.S.'s prior prostitution activities might have been relevant with regard to this theory had the police initiated contact with R.S. and Gregory during their encounter, they ignore the fact that *R.S.* initiated contact with police; there was no evident reason for her to lie to avoid trouble with the police.

Even if we assume for the sake of argument that Gregory is correct on this point, the defense's offer of proof established only remote prostitution activities. The trial court concluded that R.S.'s prior acts of prostitution were too remote to be relevant, a determination that was, as discussed above, well within the discretion of the trial court. If R.S.'s prior prostitution activities were too remote to be relevant to the issue of consent, then certainly they were too remote to be relevant to whether she lied to get revenge for lack of payment.

Gregory cites to *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) and *Olden v. Kentucky*, 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988), to support his theory. While those cases found that the defendants should have been able to cross-examine witnesses on issues pertaining to potential bias, both courts were clear that the evidence in question was *relevant*. *Davis*, 415 U.S. at 314; *Olden*, 488 U.S. at 232. Gregory has no constitutional right to present irrelevant evidence. *Hudlow*, 99 Wn.2d at 15.

Gregory also cites to cases from other states to support his argument. In one case, the court speculated that evidence of prostitution would have supported the defendant's argument that the rape story was fabricated in retaliation for failure to pay for sex. Yet this statement was dicta, and the prostitution was not remote. *Commonwealth v. Davis*, 438 Pa. Super. 425, 652 A.2d 885, 889 n.3, 890 (1995). In other cases, the evidence in question would have been relevant, where here it was not. *See Commonwealth v. Joyce*, 382 Mass. 222, 415 N.E.2d 181, 183-84 (1981)

(police interrupted the encounter between the victim and the defendant and she had recently been charged for prostitution under similar circumstances); *see also Lewis v. State*, 591 So. 2d 922, 923, 925 (Fla. 1991); *State v. Jalo*, 27 Or. App. 845, 557 P.2d 1359, 1360, 1361-62 (1976) (sexual history of young victims was relevant because making a false accusation would have kept the youth from getting in trouble for consensual sexual activity).[9] In another case, the prior exchange of sex for drugs was relevant because it had occurred only one week before the incident in question. *See Johnson v. State*, 332 Md. 456, 632 A.2d 152, 153-54 (1993).[10] None of these cases stands for the proposition that remote prostitution convictions should be admitted to show motive for the victim to fabricate a rape accusation. We conclude that R.S.'s remote acts of prostitution are not relevant to show a motive to lie, and we reiterate that a defendant has no constitutional right to present irrelevant evidence. In sum, the trial court's evidentiary rulings pursuant to the rape shield statute were proper.

In Camera Review of R.S.'s Dependency Files and Counseling Records

In Camera Review, Generally: The United States Supreme Court has held that for due process to justify in camera review of a record that is otherwise deemed

[9] Another case has been clarified. *See State v. Herndon*, 145 Wis. 2d 91, 426 N.W.2d 347 (1988), limited by *State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325, 335 (1990) (requiring evidence of prior sexual conduct to be relevant and necessary to the defendant's case, more probative than prejudicial, and involve similar circumstances).

[10] The concurrence attempts to draw a comparison between this case and *Johnson,* 632 A.2d 152. Concurrence at 23. However, the concurrence ignores the fact that the *Johnson* victim had exchanged sex for drugs only one week before the incident in question. *Id.* at 153-54.

privileged or confidential by statute, the defendant must establish "a basis for his claim that it contains material evidence." *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n.15, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). There must be a "'plausible showing'" that the information will be both material and favorable to the defense. *Id.* (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982)). Evidence is material only if there is a reasonable probability that it would impact the outcome of the trial. *Ritchie*, 480 U.S. at 57. A reasonable probability is probability sufficient to undermine confidence in the outcome. *Id.* The decision whether to conduct an in camera review of privileged records is subject to abuse of discretion review. *State v. Kalakosky*, 121 Wn.2d 525, 550, 852 P.2d 1064 (1993).

In *Ritchie*, the defendant was prosecuted for sexually abusing his daughter. *Ritchie*, 480 U.S. at 43. He argued that his daughter's Children and Youth Services (CYS) file might contain the names of favorable witnesses or other exculpatory evidence, and thus, the trial court erred in refusing to conduct and in camera review of the CYS file. *Id.* at 44. Even though it was impossible to say whether any information in the CYS records would actually support Ritchie's arguments, the Court held that the defendant was entitled to have the file reviewed by the trial court to determine whether it contained information that probably would have changed the outcome of Ritchie's trial. *Id.* at 57-58.

In *Kalakosky*, this court evaluated whether the trial court should have

conducted an in camera review of a sexual assault victim's counseling file, which is subject to a qualified privilege by statute. RCW 70.125.065 requires a written motion and affidavits setting forth *specifically* the reasons why the defendant is requesting discovery. The court concluded, based upon the statutory language, that "before a rape victim's privacy should be invaded by a review of crisis center counseling notes . . . the defendant must make a *particularized showing* that such records are likely to contain material relevant to the defense." *Kalakosky*, 121 Wn.2d at 550 (emphasis added). The *Kalakosky* court concluded that the motion in that case, which stated only that the counseling notes "'may contain details which may exculpate the accused or otherwise be helpful to the defense,'" did not make the required particularized showing. *Id.* at 544, 550.[11]

In sum, mere speculation is not enough to justify in camera review and a defendant must establish a basis for his or her claim that the records in question contain material evidence. *Ritchie*, 480 U.S. at 58 n.15. Based on the statutory language protecting rape crisis center records, a particularized showing is required

[11] In *State v. Diemel*, 81 Wn. App. 464, 468, 914 P.2d 779, *review denied*, 130 Wn.2d 1008, 928 P.2d 413 (1996), the defendant argued that the tests for in camera review of privileged records set forth in *Ritchie* and *Kalakosky* were inconsistent. *Id*. at 468. Diemel asserted that *Kalakosky*'s "particularized showing" could be construed as a higher burden than constitutionally allowed by the "plausible showing" suggested in *Ritchie*. *Id*. The *Diemel* court rejected this theory, concluding that both *Ritchie* and *Kalakosky* require some showing of materiality. *Id*. "[C]onsiderable speculation," and "little factual basis or foundation" were all that supported Diemel's assertion that the requested records might contain evidence that the victim consented to sex with the defendant. *Id*. at 469. This was not sufficient under either *Ritchie* or *Kalakosky*. Requiring a particularized showing does not conflict with the *Ritchie* requirement that the defendant must establish a basis for his or her claim.

to support review of those records. *See* RCW 70.125.065; *Kalakosky*, 121 Wn.2d at 550.

Counseling Records: On direct, when the prosecutor asked R.S. if she had discussed the rape with anyone else, she reported that she had discussed the incident in counseling at a rape crisis center. Gregory objected and outside of the presence of the jury, his counsel argued that the State should not be allowed to present evidence regarding counseling when the defense could not have access to the counseling records. The trial court concluded that the State did not "[go] into the content of the counseling" but rather only mentioned "the fact that she has received counseling." RRP at 2086.

The defense may not circumvent the statutory requirements for in camera review of a rape crisis center file. *Kalakosky*, 121 Wn.2d at 549. In this case, the defense did not submit a written pretrial motion supported by affidavits, as required by RCW 70.125.065(1). Gregory cites to no place in the record where defense counsel made a motion for in camera review of the counseling records at all. We conclude that Gregory did not meet the statutory requirements for in camera review.[12, 13]

Dependency Files: The defendant requested that the trial court review in

[12] Gregory seems to argue that when R.S. told the jury that she had discussed the incident with a rape counselor, that she opened the door to cross-examination as to what she told her counselor. However, R.S. did not discuss any details of her counseling visits, only that she received counseling. Therefore, the trial court acted well within its discretion when it concluded that the State had not opened the door.

camera the dependency files of R.S.'s children. Gregory claimed that the files might contain evidence of *recent* prostitution activities that might be admissible under the rape shield statute. Defense counsel explained that R.S. had admitted that she had entered drug treatment in April 1999 because of a pending dependency action. He asserted that because she had not "cleaned up her act" before April 1999, it was likely that the dependencies were open in 1998 when the rape occurred. He argued that if caseworkers were aware of any prostitution activity in 1998, the file would reflect that awareness.

The trial judge denied Gregory's request, believing R.S. had been forthcoming in her interview when she stated that the dependency centered around her drug addiction and theft to support her drug habit. The trial court granted defense counsel's request to interview R.S. again, this time asking questions about recent prostitution activity. The trial judge believed that R.S.'s answers to these questions would directly provide the sought after information, and thus, in camera review of the files was unnecessary. The trial judge also cited the children's privacy as a reason for denying in camera review. The defense countered that if R.S. denied recent prostitution, in camera review of the dependency files would ensure that they contained no evidence that would impeach R.S. on this point. Even so, the trial

[13] Gregory notes that during closing arguments, when listing the people that R.S. talked to about the rape, the State suggested her statement to the rape counselor was consistent with her other statements about the incident. At that point, the proper objection would have been that the State was making an argument not supported by the evidence. No such objection was made and Gregory does not make an argument here that the prosecutor's statement constituted misconduct.

judge declined to change her ruling.[14]

RCW 13.50.010 and RCW 13.50.100 provide that dependency files shall be confidential and shall be released only under certain circumstances, none of which are being argued here. RCW 13.50.100(2). Therefore, in camera review of the dependency files would have been appropriate only if the *Ritchie* test was met. To justify in camera review, Gregory had to establish a basis for his claim that the dependency file would likely contain evidence of recent prostitution activities.

This case came down to a credibility contest between Gregory and R.S. The State, in closing argument, repeatedly emphasized that the ultimate determination for the jury in this case was who was more credible, Gregory or R.S. Because Gregory's version of events was that R.S. had consensual sex with him for money, admissible evidence of recent, factually similar prostitution would have been reasonably likely to impact the outcome of the trial. It is also reasonable to conclude that if the Department of Social and Health Services (DSHS) were aware of any recent prostitution activity, it would have been addressed in the dependency files. Moreover, R.S.'s deposition testimony indicated that at least one dependency was likely active during 1998. Thus, in camera review of the dependency files

[14] In other evidentiary rulings, the trial court excluded any inquiry into or reference to R.S.'s prior drug use, other than her drug use on the night in question, which she admitted during direct and cross-examination. The trial court also excluded any reference to dependency proceedings involving R.S., including court recommended drug treatment. The court excluded any reference to R.S.'s work as a police informant. Finally, the court excluded any reference to R.S.'s family or prior pregnancies. *None* of these evidentiary rulings was challenged on appeal.

might have led to witnesses that could confirm or refute R.S.'s claim that she did not engage in streetwalking after 1995. In camera review of the files would not have unnecessarily delayed the trial because the trial judge had already agreed to allow for a second interview of R.S. On balance, the invasion of the children's privacy interests upon in camera review does not overcome Gregory's interest in obtaining a fair trial. We conclude that the trial judge should have reviewed the then-pending dependency files to determine if they contained information that could lead to admissible evidence that R.S. engaged in similar prostitution activity near to the time of this incident.[15] We hold that the trial court's failure to do so amounted to abuse of discretion.

The proper remedy for such an abuse of discretion is remand to the trial court for in camera review of the relevant files. *Ritchie*, 480 U.S. at 58. If the information in the files would probably have changed the outcome of the trial, then the defendant is entitled to a new trial. But if nondisclosure was harmless beyond a reasonable doubt, then the convictions can be reinstated. *Id.*; *see also State v. Allen*, 27 Wn. App. 41, 49, 615 P.2d 526 (1980); *State v. Harris*, 91 Wn.2d 145, 152, 588 P.2d 720 (1978). The intent on remand is to place the parties in the

[15] The *Diemel* court held that "[a] claim that privileged files *might* lead to other evidence or *may* contain information critical to the defense is not sufficient to compel a court to make an in camera inspection." *Diemel*, 81 Wn. App. at 469 (emphasis added). Speculation was simply not enough. *Id.* However, Gregory made a more concrete connection between his theory of the case and what he expected to find in the dependency files, i.e., it was reasonable to believe that if R.S. was still engaging in prostitution in 1998, evidence of that would be reflected in the dependency files, and if so, the reports contained therein could reveal potential witnesses.

position they were in pretrial. *United States v. Alvarez*, 358 F.3d 1194, 1209 (9th Cir. 2004). Thus, after oral argument in this case, we remanded to the trial court for review of the dependency files of R.S.'s children that were pending at the time of the rape trial. The trial court conducted review and submitted to this court public findings of fact and conclusions of law, supplemental sealed findings of fact, and the sealed dependency files themselves.[16]

The public findings of fact reveal that the dependency files contain R.S.'s criminal history, including reference to prostitution that occurred many years before the 1998 incident with Gregory. But the dependency files "contain no information regarding prostitution activities as a reason for the dependency." RCP at 927, Finding of Fact (FOF) 6. Even so, the trial judge concluded that the dependency court's social file

> contains information that might have been used to impeach some of the answers [R.S.] gave at the August 8, 2000, [pretrial] interview with Mr. Gregory's attorney, but that information does not relate to prostitution or the consent issue raised by Mr. Gregory.

RCP at 927, FOF 5. The trial judge concluded:

> Without deciding whether such information would have been admissible, material, or whether its exclusion was harmless error, to the extent either the defendant or the State would have used the information as evidence, or whether it would have led to evidence, the undersigned finds that it was *relevant* to the above-entitled case.

[16] Article IV, section 2 of the Washington Constitution requires "[i]n the determination of causes all decisions of the [supreme] court shall be given in writing and the grounds of the decision shall be stated." In order to publish an opinion which states the grounds for our decision, we now find it necessary to refer to portions of the record. However, the record otherwise remains sealed.

RCP at 927, FOF 7 (emphasis added).[17]

In his supplemental briefing, Gregory argues that various evidence revealed in the dependency files was relevant, admissible, and material, and that its nondisclosure was not harmless beyond a reasonable doubt. Both the United States Supreme Court and this court have held that due process guarantees criminal defendants access to material information in the possession of the court or the prosecution, including material impeachment evidence. *State v. Knutson*, 121 Wn.2d 766, 771-72, 854 P.2d 617 (1993); *see also Ritchie*, 480 U.S. at 56-57; *Alvarez*, 358 F.3d at 1207-08 ("Evidence affecting the credibility of . . . witnesses is material . . . ."). Evidence is material, for the purposes of this due process rule, if there is a """reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,""" or if the information "probably would have changed the outcome of [the] trial." *Knutson*, 121 Wn.2d at 772 (quoting *In re Rice*, 118 Wn.2d 876, 887, 828 P.2d 1086 (1992) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985))); *Ritchie*, 480 U.S. at 58. A reasonable probability is "'a probability sufficient to undermine confidence in the outcome.'" *Knutson*, 121 Wn.2d at 773

[17] In this court, defense counsel moved for unsealing of the sealed materials so that they could view the relevant materials. We granted that motion in part, transferred packets of the sealed findings of fact and relevant pages of the sealed files to counsel, and requested that the parties submit briefing as to whether the information identified in the supplemental findings of fact was material (including whether it would have been admissible), whether the information would have led to relevant, admissible, and material evidence, and whether nondisclosure was harmless beyond a reasonable doubt.

(quoting *Rice*, 118 Wn.2d at 887). To be material, there must be "more than a 'mere *possibility*' that evidence '*might* have affected the outcome of the trial.'" *Id.* at 773 (quoting *State v. Mak*, 105 Wn.2d 692, 704-05, 718 P.2d 407 (1986)).

"Wrapped up in this standard of materiality are issues of admissibility; if evidence is neither admissible nor likely to lead to admissible evidence[,] it is unlikely that disclosure of the evidence could affect the outcome of a proceeding." *Id*. To be admissible, and possibly material, evidence must also be relevant. *Id.* Evidence is relevant if it makes the existence of a fact of consequence to the case more likely or less likely to be true than without the evidence. ER 401. Finally, the *Ritchie* Court held that despite a trial court's erroneous refusal to conduct in camera review, a conviction could stand if "nondisclosure was harmless beyond a reasonable doubt." *Ritchie*, 480 U.S. at 58. In considering the impact of nondisclosure, a court must consider whether the information was already known to the defense or whether reasonable diligence would have uncovered the information through alternative means. *Cf. Thomas*, 150 Wn.2d at 851 (nondisclosure does not result in a *Brady* violation if the defendant could have obtained the information himself through reasonable diligence).

In this case, R.S. told defense counsel in an interview on August 8, 2000, that her last drug use was in April 1999. However, the dependency file reveals that R.S. had a serious relapse in June 2000 and had to go into drug treatment. In addition, while R.S. told defense counsel that she did not believe the dependency court had

ordered her to get drug treatment, the court, in fact, had done so.[18]

Evidence Rule 608(b) provides that specific instances of a witness's conduct, introduced for purposes of attacking the witness's credibility, may not be proved by extrinsic evidence, but may, "in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness." ER 608(b). In exercising its discretion, the trial court may consider whether the instance of the witness's misconduct is relevant to the witness's veracity on the stand and whether it is germane or relevant to the issues presented at trial. *State v. O'Connor*, 155 Wn.2d 335, 349, 119 P.3d 806 (2005). While R.S.'s lie to defense counsel about her recent drug use was not a lie under oath because the August 8, 2000 interview was not a deposition, it was a very *recent* lie in response to questioning from defense counsel in the context of *this case*. R.S.'s lie was relevant to her veracity on the stand and it was relevant to this case. *See O'Connor*, 155 Wn.2d at 351. Thus, it is likely that the trial court would have allowed defense counsel to cross-examine her on the subject. *Cf.* RRP 2100-01 (allowing cross-examination of R.S. regarding instances of dishonesty with police that were more remote in time).

The State argues that because there were other avenues for impeaching R.S.,

[18] While the dependency files also reveal that R.S. lied to the dependency court regarding her September 2000 relapse, this occurred on October 2, 2000, *after* R.S.'s testimony in the *Gregory* case. Therefore, it could not have been used to impeach her. Furthermore, R.S.'s September 2000 relapse occurred *after* her interview with defense counsel in August 2000, so she did not lie about the September relapse in the interview.

the lie to defense counsel would not have been likely to change the outcome of the trial and nondisclosure was harmless. On cross-examination, defense counsel asked R.S. about five convictions for theft in the third degree that had occurred over the course of the prior 10 years, about R.S. giving false names to police on several occasions throughout the 1990s, about R.S.'s use of alcohol, marijuana, and crack cocaine on the day of the rape, and about inconsistencies in her accounts to police.

These other avenues for impeachment call into question the materiality of R.S.'s lie to defense counsel. However, the theft convictions and the instances of giving false names to police were not recent, while the August 2000 lie to defense counsel had occurred only weeks before. The lie occurred in the context of questioning regarding *this* case, and it undercut any argument that R.S. had reformed her old ways. Moreover, the State in closing argument *repeatedly* emphasized that the ultimate determination for the jury in this case was who was more credible, Gregory or R.S. RRP at 2906 ("Did [R.S.] tell you the truth, or did Allen Gregory tell you the truth? That's the determination that you are going to have to make."); 2910 ([I]t's his word against [R.S.'s]. It's 50-50. He has got a 50-50 chance you are going to believe him."); 2913 ("It comes down to credibility. The question is, who are you going to believe, [R.S.] or Allen Gregory?"); *see also* 2967 (noting that R.S. admitted that getting in the car was stupid and arguing that if she were lying, she would have made up a better story). While the State asserts that other avenues of impeachment render this additional information superfluous, at

least one court has held that where credibility is a central question, if there is a reasonable probability that the cumulative effect of the undisclosed impeachment evidence, together with the disclosed impeachment evidence, "would have affected the jury's assessment of the witness's credibility," then the exclusion should be considered prejudicial. *See Benn v. Lambert*, 283 F.3d 1040, 1056 (9th Cir. 2002). Materiality of this impeachment evidence is a close question, but it seems impossible to conclude, beyond a reasonable doubt, that cross-examination illuminating R.S.'s recent lie would not have impacted the outcome of the trial. To the contrary, under the facts of this case, the additional impeachment evidence in the dependency files could have reasonably impacted the outcome of the trial and nondisclosure was not harmless beyond a reasonable doubt. We therefore reverse the rape convictions.

Of the evidence discussed in Gregory's supplemental briefing, this was the only evidence that the trial court found to be relevant. Despite Gregory's additional arguments, we also conclude that no other information revealed in the dependency files is material, and Gregory has failed to successfully challenge any other evidentiary ruling in this case.[19] Gregory has raised several additional claims of error in the rape case. In the event of retrial, those issues could arise again and thus, we proceed to address Gregory's other claims of error.

Jury Instruction on the Defense of Consent

In the rape case, Gregory pleaded not guilty and before trial he changed his

defense from denial to consent; he admitted to having had sex with R.S., but claimed the encounter was consensual. The jury was instructed that to convict Gregory of any one of the three counts of first degree rape, it had to conclude that the sexual intercourse occurred as the result of "forcible compulsion." RCP at 480-82. The jury was also instructed that "[t]he burden is on the defendant to prove by a preponderance of the evidence that the sexual intercourse was consensual." RCP at 483. This instruction defined consent to mean "at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse." RCP at 483; *see also* RCW 9A.44.010(7). The defense requested an instruction that defined consent but did not impose a separate burden apart from the burden on the prosecution to prove each element beyond a reasonable

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[19] Gregory also argues that the trial court should have evaluated the DSHS records, in addition to the court dependency files. Chapter 13.50 RCW governs files and records kept by juvenile justice or care agencies. RCW 13.50.010 explains that the official juvenile court file is the legal file containing the petition or information, motions, memoranda, briefs, findings, and court orders. RCW 13.50.010(1)(b). The social file means the records and reports of the probation counselor, or in this case, the reports of the guardian ad litem and the DSHS caseworkers. *See* RCW 13.50.010(1)(d). The term "records" includes the legal and social files *and* the records of the juvenile care agency, including DSHS.

The purpose of remand for in camera review is to correct error by placing attorneys in the same position as they were in when in camera review was requested. *See Alvarez*, 358 F.3d at 1209. The arguments of Gregory's counsel at the time reflect his request that the court review files accessible to the judge, without additional discovery. The court social file contains both caseworker and guardian ad litem reports containing periodic summaries of the child's and parent's progress, recommendations, information supporting such recommendations, and services offered to the parent and child. The files also contain background information, including the case history. The social file is extensive enough to reveal the reasoning behind DSHS recommendations. Information supporting DSHS recommendations and all court orders are reflected in the court files. We conclude that there is no need for review of additional DSHS records.

doubt.[20]

Any instruction on the burden of proof must comply with the requirement that the State must bear the burden to prove every element of the crime beyond a reasonable doubt. *Camara*, 113 Wn.2d at 638 (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Gregory now argues that requiring him to prove consent by a preponderance of the evidence violated due process because the jury could have become confused, thinking that it could acquit *only* if consent is proved by a preponderance of the evidence, even if a reasonable doubt may have been raised with regard to the element of forcible compulsion. *See State v. Riker*, 123 Wn.2d 351, 366-67, 869 P.2d 43 (1994) (describing a similar potential problem with regard to the defense of duress). While Gregory admits that this court resolved this issue in *Camara*, 113 Wn.2d at 640, he contends that *Camara* should be overruled.

In holding that due process permits an instruction requiring the defendant to prove consent, the *Camara* court relied on *Martin v. Ohio*, 480 U.S. 228, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987). In *Martin*, the United States Supreme Court held that a defendant could be required to prove self-defense even where the evidence necessary to prove self-defense would often tend to negate an Ohio element of aggravated first degree murder, "purposeful killing by prior calculation and design."

[20] "'Forcible compulsion' means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped." RCW 9A.44.010(6).

Id. at 234. The *Martin* Court noted that there are two distinct questions that a jury must answer. The jury must determine whether each element of the crime has been proven beyond a reasonable doubt, and the jury must determine whether the elements of the defense have been met. Even if a defendant could not prove self-defense by a preponderance of the evidence, the jury nevertheless could acquit if it believed there was reasonable doubt as to any fact necessary to support the elements of the crime. *Id.* at 234. Therefore, while evidence offered to support a defense may also tend to negate an element of the crime, that does not necessarily shift to the defendant the burden of disproving any element of the State's case. *See id.* The *Martin* dissent doubted that a jury could reliably grasp this distinction, arguing that a jury would become confused and shift the burden to the defendant. *See id.* at 237-38 (Powell, J., dissenting). However, the *Martin* majority refused to "harbor the dissent's mistrust of the jury" and concluded that the instructions were sufficiently clear to convey that the State's burden did not shift. *Id.* at 234 n.1.

After *Martin*, the *Camara* court expressed substantial doubt as to the continued viability of the so-called "negates" analysis (asking only whether a defense negates an element of the crime), and the court declined to apply the negates analysis to the consent defense. *Camara*, 113 Wn.2d at 639. Following *Martin*, the *Camara* court held that "while there is a conceptual overlap between the consent defense to rape and the rape crime's element of forcible compulsion, we cannot hold that for that reason alone the burden of proof on consent must rest with

the State." *Id*. at 640. The burden to prove consent properly lies with the defendant. *Id.* Even so, the instructions must reflect the State's unalterable burden to prove each element of the crime beyond a reasonable doubt. *Id.*

Then, in *Riker*, this court noted that self-defense and alibi defenses could negate elements of a crime. 123 Wn.2d at 367-68. The *Riker* court distinguished the defense of duress because it condones the defendant's admittedly unlawful conduct. *Id.* at 368. Yet the *Riker* court included the consent defense to rape in its list of defenses that did *not* negate an element of the crime, and the *Riker* court did not question the *Camera* holding. *Id.* at 366-67.

Gregory concedes that the instructions read to the jury in his rape case provide a correct statement of current law but claims that the *Camara* court incorrectly analyzed the *Martin* decision. We disagree; the *Martin* analysis clearly supports the *Camara* court's conclusion. The jury in a first degree rape case must be convinced that none of the evidence presented raises a reasonable doubt that sexual intercourse occurred as the result of forcible compulsion. *See Martin*, 480 U.S. at 233. Therefore, so long as the jury instructions allow the jury to consider all of the evidence, including evidence presented in the hopes of establishing consent, to determine whether a reasonable doubt exists as to the element of forcible compulsion, the conceptual overlap between the consent defense and the forcible compulsion element does not relieve the State of its burden to prove forcible compulsion beyond a reasonable doubt.[21] We decline to overrule *Camara* and

conclude that the jury instructions here complied with due process.[22]

[21] Very recently the United States Supreme Court decided *Dixon v. United States,* 548 U.S. ___, 126 S. Ct. 2437, 165 L. Ed. 2d 299 (2006). In that case, the Court concluded that due process permitted a jury instruction that required a defendant to prove the defense of duress by a preponderance of the evidence. *Id.* at 2442. In doing so, the *Dixon* Court, like the *Riker* court, noted that while duress did not negate an element of the crime at issue, "there may be crimes where the nature of the *mens rea* would require the Government to disprove the existence of duress beyond a reasonable doubt." *Id.* at 2442 n.4. Even though the *Dixon* Court did not entirely rule out the possibility that duress could negate the mens rea element of a crime, the *Dixon* Court did not explicitly overrule *Martin,* or even suggest that it was limiting *Martin*'s scope. Therefore, *Dixon* does not affect our reliance on *Martin* in this case.

[22] Gregory also argues that *Spicer v. Gregoire*, 194 F.3d 1006 (9th Cir. 1999), disagreed with the *Camara* opinion. *Id.* at 1008. However, the relied upon portion of the *Spicer* opinion was describing Spicer's arguments, and the court did not endorse this conclusion. The court actually concluded that it need not reach the constitutionality of the jury instruction, so it did not decide this issue. *Id.*

Evidence Regarding R.S.'s Reputation in the Community

At trial, Gregory sought to present testimony from Eric Larson, R.S.'s ex-boyfriend and the father to one of her children. Larson sought to testify about R.S.'s poor reputation for truth and honesty within the community. The trial court ruled that Larson's testimony was inadmissible because R.S.'s family did not constitute a community that is both neutral and general, since the community consisted only of Larson and R.S.'s sister, and Larson's understanding of R.S.'s reputation was too remote from the time of the trial.

Evidence Rule 608 provides that the credibility of a witness may be attacked by evidence of the witness's reputation for untruthfulness in the community. "To establish a valid community, the party seeking to admit the reputation evidence must show that the community is both neutral and general." *State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993). Relevant factors include "the frequency of contact between members of the community, the amount of time a person is known in the community, the role a person plays in the community, and the number of people in the community." *Id.* Whether a party has established proper foundation for reputation testimony is within the trial court's discretion. *Id.*

The trial court found that R.S.'s family was neither neutral nor sufficiently generalized to constitute a community for the purposes of ER 608.[23] We agree. First, the inherent nature of familial relationships often precludes family members

[23] *See Land*, 121 Wn.2d at 500-01 (holding that business communities can constitute a neutral or general community).

from providing an unbiased and reliable evaluation of one another. In addition, the "community" with which Larson had discussed R.S.'s reputation included only two people, Larson and R.S.'s sister. Any community comprised of two individuals is too small to constitute a community for purposes of ER 608. *State v. Lord*, 117 Wn.2d 829, 874, 822 P.2d 177 (1991) (community must be general). Finally, the trial court found that any awareness that Larson had of R.S.'s reputation for truthfulness was too remote in time to be relevant. This court has previously held that information several months old is too remote. *Lord*, 117 Wn.2d at 874-75. A review of the record indicates that Larson was testifying based upon knowledge he obtained several years prior to the time of trial. Under the circumstances, the trial court properly ruled that Larson's testimony was inadmissible as reputation evidence under ER 608(a). The trial court did not abuse its discretion.

R.S.'s Testimony About How She Felt About Testifying

Upon examination of R.S., the prosecutor asked, "how do you feel about having to testify in court and . . . be cross-examined?" RRP at 2153. Defense counsel objected as to relevance, but the court overruled the objection. R.S. answered:

> You know, it's like I had stated. I've tried for two years to put this behind me, you know. I want to get on with my life. It's a horrific experience. I'm angry. I just want to get it over with. You know, it's like for two years, I tried to forget about it. And since this trial started, I've had to remember it. I've had sleepless nights again. I've gone through nightmares again. And I'm just—I'm upset. I'm really upset. And I just would like to get on with my life and, you know, put this behind me, you know. It's just one of those things that —

> I don't like having to recall all this stuff. I hate it. I hate having to remember it, you know. I hate having to go through all these feelings, you know, that I went through, you know. And it's just—I just—I just—I just—I wouldn't want my worst enemy to have to go through what I've gone—

RRP at 2153-54. Defense counsel objected to the narrative form of the response and the court directed the prosecutor to move on. In closing, the prosecutor read back to the jury R.S.'s answer to this question. He then argued that R.S. would not have subjected herself to the trial process just to avenge a broken condom. The defense did not object. Gregory now argues that the prosecutor chilled the exercise of his federal and state constitutional rights to trial and to confrontation by asking how R.S. felt about cross-examination. In the alternative, Gregory argues that the question and the prosecutor's argument in closing improperly appealed to the jury's sympathy.

Comment on Constitutional Rights: This court has recognized that "[t]he State can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right." *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 571 (1984). The Court of Appeals has specifically concluded that the State may not invite the jury to draw a negative inference from the defendant's exercise of his right to cross-examine witnesses. *State v. Jones*, 71 Wn. App. 798, 811-12, 863 P.2d 85 (1993). However, both the United States Supreme Court and Washington courts have recognized that not all arguments touching upon a defendant's constitutional

rights are impermissible comments on the exercise of those rights. *See Portuondo v. Agard*, 529 U.S. 61, 69, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000); *State v. Miller*, 110 Wn. App. 283, 284, 40 P.3d 692, *review denied*, 147 Wn.2d 1011 (2002). This court has characterized the relevant issue as "whether the prosecutor manifestly intended the remarks to be a comment on that right." *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991). These cases suggest that so long as the focus of the questioning or argument "is not upon the exercise of the constitutional right itself," the inquiry or argument does not infringe upon a constitutional right. *Miller*, 110 Wn. App. at 284.

Gregory acknowledges that this case came down to a credibility contest between Gregory and R.S. Gregory claimed that R.S. fabricated the rape story and pursued prosecution in revenge for his failure to pay $20 to compensate R.S. for a broken condom. The State sought to rebut this attack on R.S.'s credibility by showing that R.S. did not relish having to testify and be cross-examined. The State's theory was that it was unlikely that R.S. would have put herself through a trial to avenge a broken condom. The State did not specifically criticize the defense's cross-examination of R.S. or imply that Gregory should have spared her the unpleasantness of going through trial.

Gregory points to *Jones*, 71 Wn. App. at 811, in which the Court of Appeals concluded that the defendant's Sixth Amendment rights were violated when the prosecutor, in cross-examination and closing, commented that the defendant insisted

upon staring at the seven-year-old victim as she testified. The prosecutor's arguments also suggested that the victim's courtroom contact with Jones was so traumatic that she could not return to court. *Id*. The *Jones* court held that this amounted to an improper comment on the defendant's right to confront his accuser. *Id.* at 811-12. While the State in *Jones* asserted that these arguments were offered to rebut Jones' contention that he loved the victim, the *Jones* court concluded that the prosecutor's argument invited the jury to draw a negative inference from the defendant's exercise of his right of confrontation. *Id*.

The *Jones* case is distinguishable from the facts of this case because in *Jones* the prosecutor's comments directly implicated Jones' constitutional right of confrontation. In contrast, the questioning and argument in this case focused on the *credibility* of the victim versus Gregory. *See Crane*, 116 Wn.2d at 331; *Miller*, 110 Wn. App. at 284. Gregory does not point to any case in which a general discussion of the emotional cost of victim testimony, offered to support the victim's credibility, amounted to an improper comment on the defendant's right to confrontation.

We conclude that the questioning and argument at issue here were not improper because they did not focus on Gregory's exercise of his constitutional rights to trial and to confront witnesses. Instead they focused on the credibility of the victim as compared to the credibility of the accused. To the extent that Gregory also argues that the prosecutor's reference to R.S.'s testimony in closing argument amounted to prosecutorial misconduct, that argument also fails.[24]

Appeal to the Jury's Sympathy: In the alternative, Gregory asserts that the introduction of the above testimony improperly appealed to the jury's sympathy. Mere appeals to the jury's passion or prejudice are improper. *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). In *State v. Claflin*, 38 Wn. App. 847, 690 P.2d 1186 (1984), *review denied*, 103 Wn.2d 1014 (1985), the Court of Appeals condemned an argument where the prosecutor read a poem that poignantly reflected how the rape victim "'probably felt.'" *Id.* at 849-50. However, as discussed above, the State's purpose in presenting this testimony was to rebut Gregory's argument that R.S.'s version of events was not credible. In addition, the jury instruction explaining that the jury should not let sympathy guide its decision would arguably have cured any sympathetic tendencies the jury may have had in this regard. Therefore, it cannot be said that the State improperly appealed to the jury's sympathy.[25]

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[24] There has been some disagreement as to the impact of a failure to object at trial upon a claim on appeal that a prosecutor's argument amounted to an improper comment on a constitutional right. *Compare*, *e.g.*, *State v. Belgarde*, 110 Wn.2d 504, 510-12, 755 P.2d 174 (1988) (analyzing comment on constitutional right independently from claims of nonconstitutional prosecutorial misconduct) *and Jones*, 71 Wn. App. at 809-10 (analyzing comment on constitutional right under RAP 2.5(a) for manifest error) *with State v. Jordan*, 106 Wn. App. 291, 296-97, 23 P.3d 1100 (2001) (analyzing alleged comment on Sixth Amendment right during closing argument under a prosecutorial misconduct standard of review, asking whether a curative instruction would have cured the defect) *and State v. Klok*, 99 Wn. App. 81, 83-84, 992 P.2d 1039 (2000) (same). *See also State v. Holmes*, 122 Wn. App. 438, 93 P.3d 212 (2004) (providing yet another analysis where a comment on the Fifth Amendment right to silence arises during testimony). Because we hold that R.S.'s testimony and the prosecutor's argument did not constitute a comment on the defendant's Sixth Amendment rights, we need not resolve this issue here.

[25] In his reply brief, Gregory points to additional instances during closing argument where the prosecutor discussed how much courage it takes for a rape victim to participate

Prosecutor's Closing Argument

During closing argument at trial, the prosecutor argued that for Gregory's defense to succeed, "[Gregory] has got to make [R.S.] look like a prostitute, got to make her look bad." RRP 2923. The prosecutor also argued that accusing R.S. of being a prostitute added "a little extra insult to injury." RRP at 2923-24. Defense counsel objected to both statements and was overruled. Gregory argues that these statements were so improper they require reversal. We disagree.

To establish prosecutorial misconduct during closing argument, the defendant bears the burden of demonstrating that the prosecutor's remarks were improper and that they prejudiced the defense. *State v. Kwan Fai Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986). Where, as here, defense counsel objected, this court must evaluate the trial court's ruling for abuse of discretion. *Id.*

Gregory argues that the prosecutor's closing arguments left the jury with the false impression that R.S. was *never* a prostitute. Gregory cites to *Giglio v. United States*, 405 U.S. 150, 153, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) for the proposition that reversal is required where deliberate deception of the court and jurors has occurred. However, that is clearly not what happened here. The prosecution in *Giglio* suppressed material evidence regarding a promise of leniency. *Id.* at 152, 154. Here, there was no suppression of relevant evidence. The

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in a trial and where the prosecutor explained R.S.'s anger on the stand. To the extent that these are separate claims that the prosecutor commented on a constitutional right, the same analysis applies.

prosecutors were very careful not to state that R.S. had *never* acted as a prostitute. The prosecutor sought to rebut defense counsel's theory that R.S. was prostituting herself on the night in question and got angry over a fee dispute. We conclude that the trial court did not abuse its discretion.

During closing argument, the prosecutor also stated that "[R.S.] has come in here to be 100 percent honest." RRP at 2967. Defense counsel objected but was overruled. Gregory argues that reversal is required because this statement expressed the prosecutor's personal opinion with regard to R.S.'s credibility. We disagree. Allegedly improper statements should be reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Just before and just after this comment, the prosecutor reviewed R.S.'s admissions about that night. R.S. "stupid[ly]" got into a car with a stranger. RRP at 2967. She also admitted to having smoked marijuana and crack cocaine earlier in the evening. In context, it is clear that the prosecutor was not personally vouching for the credibility of R.S. Rather, the prosecutor invited the jury to draw the inference that R.S.'s was willing to tell the truth, even if it made her look bad. The prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Johnson*, 40 Wn. App. 371, 381, 699 P.2d 221 (1985). The trial court acted within its discretion in overruling the objection to this statement.

We conclude that none of the prosecutor's comments during closing argument in this case constituted prosecutorial misconduct. Because the individual statements discussed above do not amount to prosecutorial misconduct, Gregory's claim based on cumulative effect also fails.

Gregory also argues that the trial court imposed an improper sentence in the rape case. Because we reverse the rape convictions, we need not address this issue.

C. Conclusion

Because the trial court erred when it declined to conduct an in camera review of the dependency files of R.S.'s children that were open at the time of trial, we reverse Gregory's rape convictions. The files contained material impeachment evidence, the nondisclosure of which cannot be said to have been harmless beyond a reasonable doubt. While Gregory makes several other claims, we find no additional error.

II. Murder of G.H.

A. Murder Case Facts and Procedural History

In 1996, two years before the R.S. rapes, 43-year-old G.H. moved into a house next door to her mother's. On July, 27, 1996, when G.H. did not show up for work at the restaurant where she was employed as a bartender, her coworkers became concerned and sent someone to check on her. A coworker found the back door of G.H.'s residence unlocked. She let herself in, looked through the house, and found G.H.'s body face down on her bed.

The evidence suggested that G.H. had been attacked in her kitchen. She was probably stabbed once in the neck and then dragged into her bedroom. G.H.'s work clothes had been cut off of her and her hands were tied behind her back with apron strings. She was then stabbed three times in the back. In addition she had three deep slicing wounds to the front of her throat. One of the throat wounds was inflicted so violently that a vertebra in G.H.'s neck was broken. The medical examiner concluded that G.H. suffered blunt force trauma to the head and she had several bruises, but the cause of death was multiple sharp force injuries to her back and neck. Semen was found in G.H.'s anal and vaginal swabs, on her thigh, and on the bedspread. The evidence suggested that she was still alive when she was raped. Missing from her home were a pair of diamond earrings, jewelry, and her cash tips from that evening.

Gregory lived with his grandmother across an alley from G.H.'s home. Police began to suspect him of complicity in the murder when he gave them inconsistent statements about his whereabouts at the time of the crime. However, the police could not definitively connect him to the crime until 1998. In 1998, DNA analysis of semen found at the G.H. crime scene was compared with blood samples obtained from Gregory in the R.S. rape case. The Washington State Patrol, the Federal Bureau of Investigation (FBI), and a private lab all reported that Gregory was, to a high degree of probability, the source of the semen found at the G.H. crime scene. The various DNA tests compared differing alleles and thus produced

varying odds of a random match. For example, the private lab, conducting short tandem repeat (STR) DNA testing, concluded that the chance of a random match in the African American population was 1 in 190 billion. The Washington State Patrol, conducting restriction fragment length polymorphism (RFLP) DNA testing concluded that the chance of a random match was 1 in 235 million.

Gregory was already incarcerated awaiting trial in the R.S. rape case. He was questioned and then charged with aggravated murder in the first degree for the G.H. murder. The aggravating circumstance was that he committed the murder in the course of rape in the first degree and robbery in the first degree. The State elected to seek the death penalty. After a lengthy trial, the jury found Gregory guilty of aggravated first degree murder. Evidence was then presented to the same jury at the penalty phase. The jury concluded that "[h]aving in mind the crime of which the defendant [was] found guilty," it was convinced "beyond a reasonable doubt that there [were] not sufficient mitigating circumstances to merit leniency." MCP at 2983. Accordingly, Gregory was sentenced to death. Gregory appeals the aggravated first degree murder conviction and death sentence. Facts specific to particular issues will be discussed in more detail below.

B. Murder Case Guilt Phase Analysis

Jury Selection- Juror 1

Gregory argues that juror 1 was improperly dismissed for cause. The sixth amendment to the United States Constitution and article I, section 22 of the

Washington Constitution guarantee a defendant the right to an impartial jury. *State v. Brown*, 132 Wn.2d 529, 593, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). In order to protect a defendant's right to a fair sentencing hearing, as well as the State's ability to present its arguments to an impartial tribunal, the trial court in a death penalty case must "death qualify" the jury. *Brown*, 132 Wn.2d at 593; *see also Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985).

Death qualification is the process whereby the trial court may dismiss prospective jurors for cause if the juror's philosophical views against the death penalty would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Witt*, 469 U.S. at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980)); *State v. Davis*, 141 Wn.2d 798, 856-57, 10 P.3d 977 (2000). The juror's bias need not be "'unmistakably clear'" before dismissal is allowed. *Witt*, 469 U.S. at 424-25 (rejecting the *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968) test). Instead the trial judge can dismiss a juror when "left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Witt*, 469 U.S. at 425-26. Deference must be paid to the trial judge who sees and hears the juror. *Id.* at 426.[26]

[26] Gregory relies on *Hance v. Zant*, 696 F.2d 940 (11th Cir. 1983), but that case was decided before the *Witt* Court clarified that jurors may be excused even if they are not unmistakably clear.

Under the *Witt* test, a juror may express scruples about capital punishment, or even personal opposition to the death penalty, so long as he or she can ultimately defer to the rule of law. *Lockhart v. McCree*, 476 U.S. 162, 176, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986). Whether a juror can set aside personal feelings about the death penalty involves a credibility determination that is necessarily factual in nature. *Witt*, 469 U.S. at 429. A trial court's ruling on a challenge for cause is reviewed for manifest abuse of discretion. *Brown*, 132 Wn.2d at 601-02.

In this case, juror 1 indicated seven times that if the alternative was life with no chance of release, then she could not vote for the death penalty. In contrast, she later testified that she thought she could follow the court's instructions and impose the death penalty if the State proved death was warranted beyond a reasonable doubt. Significantly, she said that she could tell which answers counsel were looking for and she was not comfortable in disagreeing with the attorneys. She explained the inconsistencies in her answers by stating that she had had time to think about the issue. The State challenged juror 1 for cause, and the defense objected. After argument, the trial court concluded:

> This juror repeated approximately three times according to my notes, when asked if she could vote for the death penalty if she knew a person could get life in prison without parole, she said "probably not" at least three times. I know that on her questionnaire and during some of her other answers, she stated that she could if it was a serial murder type of case.
>
> I believe it's very clear from her answers that she probably is not capable of voting for the death penalty, knowing the alternative is life in prison. So I will grant the state's challenge for cause.

MRP at 2224.

Given juror 1's initial answers to questions regarding the death penalty and the suggestion that she changed her answers to please the attorneys, it is not surprising that the trial judge had the definite impression that juror 1 could not "faithfully and impartially apply the law." *Witt*, 469 U.S. at 426. "[D]eference must be paid to the trial judge who sees and hears the juror." *Id*. We find there is ample evidence in the record to support the dismissal for cause and hold that the trial court did not abuse its discretion.

Closed Courtroom

Gregory argues that when the trial court required his aunt, Tonetta Johnson, to leave the courtroom for the duration of his grandmother's testimony, the court closed the courtroom in violation of his right to a public trial under the Sixth Amendment and article I, section 22 of the Washington Constitution. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004). At trial, the State called Mae Hudson, Gregory's grandmother, to testify. The trial judge abruptly interrupted, excused the jury, and asked Hudson to step out of the courtroom. Then, the trial judge explained:

> Counsel, I have been observing that the woman seated behind [defense counsel] on the last question was shaking her head no to the witness before the witness was answering.

MRP at 5051-52. The judge ordered Johnson to step outside of the courtroom for the duration of Hudson's testimony. The court further explained:

> I earlier had seen [Johnson] smiling and laughing at the witness, but it wasn't until this last question about the facial hair that I saw her shaking her head no to Ms. Hudson. So I wanted the state and defense counsel to be apprised of that and why I need to exclude her from the courtroom.
>
> Is there any objection to that from the defense?

MRP at 5052. Defense counsel had no objection. The court ordered:

> She needs to definitely stay outside for the rest of the testimony. This could be as simple as prompting the witness, or it also could be tampering with the witness in this case. I am especially concerned because this witness may be having some memory problems in this regard. She will need to remain outside the rest of the time.

MRP at 5053. After Hudson's testimony Johnson returned to the courtroom and apologized.

In *Brightman*, *Orange*, and *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), the trial court ordered that *all* spectators be excluded from the courtroom during some part of the trial. *See Brightman*, 155 Wn.2d at 511; *Orange*, 152 Wn.2d at 802; *Bone-Club*, 128 Wn.2d at 256-57. The *Orange* and *Bone-Club* courts emphasized that the closures in those cases were full closures. *Orange*, 152 Wn.2d at 808; *Bone-Club*, 128 Wn.2d at 256-57. Here, the trial court never fully closed the courtroom. Further, neither *Orange*, *Brightman*, nor *Bone-Club* explicitly limited or undermined the trial court's inherent authority to regulate the conduct of a trial by excluding one person from the courtroom for a limited period of time. *See*, *e.g.*, *State v. Pacheco*, 107 Wn.2d 59, 67-68, 726 P.2d 981 (1986). The trial judge here explained the reason for excluding Johnson, she offered the defendant a chance to object, which he chose not to do, and she limited the

exclusion to the duration of Hudson's testimony.[27] Under these circumstances, it cannot be said that the trial court abused its broad discretion to regulate the conduct of a trial. We conclude that Gregory's right to a public trial was not violated.

Sufficiency of the Evidence to Prove Premeditation

Gregory argues that there was insufficient evidence in the record to support the element of premeditation. Evidence is sufficient to support a finding of guilt if "viewed in the light most favorable to the state, a rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Clark*, 143 Wn.2d 731, 769, 24 P.3d 1006, *cert. denied*, 534 U.S. 1000 (2001). "All reasonable inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant." *Id.*

The legislature has declared that the premeditation necessary to support conviction for murder in the first degree must "involve more than a moment in point of time." RCW 9A.32.020(1). This court has defined premeditation as

> deliberate formation of and reflection upon the intent to take a human life [that] involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.

State v. Hoffman, 116 Wn.2d 51, 82-83, 804 P.2d 577 (1991). Premeditation may be proved by circumstantial evidence where inferences supporting premeditation are

[27] It is important to note that the Ninth Circuit has held that where there is only a Sixth Amendment challenge (rather than a First Amendment challenge) to exclusion of a defendant's family member or members, the hearing requirement is met where the court has given *the defendant* an opportunity to object. *United States v. Sherlock*, 962 F.2d 1349, 1358 (1989).

reasonable and the evidence is substantial. *Clark*, 143 Wn.2d at 769.

This court has found that sufficient evidence supported the jury's finding of premeditation in cases where multiple wounds were inflicted with a knife or other weapon, there were signs of a struggle, the victim was at some point struck from behind, and there was evidence that sexual assault or robbery was an underlying motive. *Id.* at 769-70; *State v. Gentry*, 125 Wn.2d 570, 599-601, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995); *State v. Ortiz*, 119 Wn.2d 294, 312-13 (plurality), 315 (Dolliver, J., concurring), 831 P.2d 1060 (1992); *State v. Ollens*, 107 Wn.2d 848, 853, 733 P.2d 984 (1987). In *Clark*, the seven-year-old victim was stabbed at least seven times in the neck, cuts on her hands suggested a struggle, and she was sexually assaulted. 143 Wn.2d at 739, 769-70. In *Gentry*, the defendant picked up a large rock to use as a weapon, he struggled with the victim over the course of 148 feet of a wooded trail, blows were struck on both sides of the victim's head, and sexual assault was apparently attempted. 125 Wn.2d at 600-01. In *Ortiz*, the victim was found in her home, defensive wounds indicated a prolonged struggle through more than one room, and the victim had been raped. 119 Wn.2d at 297, 312-13. In *Ollens*, the victim was stabbed several times with a knife and his throat was then slashed, the victim was struck from behind, and the evidence suggested that robbery was the motive. 107 Wn.2d at 849, 853.

The facts in the instant case similarly evince premeditation. There was no sign of forced entry into G.H.'s house, G.H. was stabbed in the throat in her kitchen

and then dragged to her bedroom, G.H.'s hands were tied behind her back, her clothes were cut off of her, and G.H. was stabbed three times in the back, her throat was slit three separate times, and a vertebra in her neck was fractured. Despite her severe injuries, G.H. struggled. G.H. was raped both vaginally and anally before she died. Moreover, none of G.H.'s tip money from that evening was found, and the diamond earrings that she always wore were never recovered. Juxtaposing the facts of the instant case with those from the cases discussed above, it is evident that here there was equally substantial evidence from which the jury could have found premeditation. We conclude that there is sufficient evidence to support a finding of premeditation.

Right to Counsel During Questioning

On November 2, 1998, Gregory was in police custody after arraignment on the R.S. rape charges. Tacoma police detectives transported Gregory from the Pierce County jail to an interview room in a Tacoma police department building. The detectives read Gregory his *Miranda*[28] rights, questioned Gregory about an unrelated and still uncharged shooting, and then questioned him about the G.H. murder. At the time, Gregory was represented by counsel on the R.S. rape charges, but police did not contact counsel nor invite him to the interview. At trial, one of the detectives testified that during the interview, Gregory refused to be audiotaped, but stated that he thought DNA evidence was good evidence, and became sullen after he was accused of raping and murdering G.H. Gregory also denied ever having sex with G.H. or being in her house. Gregory now argues that the interrogation without his counsel present violated his constitutional rights.

In *Texas v. Cobb*, 532 U.S. 162, 121 S. Ct. 1335, 149 L. Ed. 2d 321 (2001), the United States Supreme Court held that the Sixth Amendment right to counsel is offense specific, attaching only to "charged offenses," which the Court defined to include any offenses that would amount to the same offense under the *Blockburger* test. *Id.* at 172-73.[29] Gregory concedes that under this standard, police could

[28] *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

[29] "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932).

interview him about the murder without violating the Sixth Amendment.

Employing a *Gunwall*[30] analysis, Gregory asserts that this court should interpret article I, section 22 of the Washington Constitution to provide greater protection than the Sixth Amendment. Specifically, Gregory urges this court to adopt a standard suggested by the *Cobb* dissenters, which is based upon the federal courts' pre-*Cobb* test: "[o]nce a charged defendant has requested counsel, he may not be interrogated about *related matters* without counsel's knowledge and consent." Appellant's Opening Br. at 101-02 (emphasis added). The *Cobb* dissent would have defined "offense" for purposes of the Sixth Amendment right to counsel as "criminal acts that are 'closely related to' or 'inextricably intertwined with' the particular crime set forth in the charging instrument." *Cobb*, 532 U.S. at 186 (Breyer, J., dissenting). Prior to *Cobb*, courts had held that "'closely related'" offenses involved "the same victim, set of acts, evidence, or motivation." *Id.*

Even if we were to adopt this "closely related" test as the Washington constitutional test, the R.S. rape and the G.H. rape/murder were not closely related. They involved different victims, they occurred two years apart, and they occurred in different locations. Other than the fact that they both involved rapes, the factual circumstances were distinct. Although Gregory claims that the cases involved the same evidence, namely his DNA, he does not point to a single pre-*Cobb* case in which the mere fact that the defendant's fingerprints or DNA were collected at both

[30] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

crime scenes rendered two crimes "closely related." In fact, crimes that were deemed closely related, pre-*Cobb*, involved the same course of conduct, the same cast of characters, were closely related in time, and/or occurred at the same location. *See*, *e.g.*, *United States v. Melgar*, 139 F.3d 1005, 1014 (4th Cir. 1998); *United States v. Arnold*, 106 F.3d 37, 42 (3d Cir. 1997). Even if a *Gunwall* analysis were to lead to the adoption of the test suggested by the defendant, there would still be no constitutional violation. Therefore, in this case, we decline to address whether the Washington Constitution should require a different test than the one articulated by the majority in *Cobb*.[31]

Admission of DNA Evidence Acquired By Rape Case Blood Draws

The trial court entered orders on two different occasions in the R.S. rape case permitting collection of the defendant's blood. The State first made a motion for a blood draw at the defendant's arraignment. The motion incorporated by reference the declaration for determination of probable cause. At the defense's request, the motion was set over. In September 1998, the trial court entered an order authorizing the first blood draw. The order was signed by the defendant's attorney, and the words "[a]pproved as to [f]orm" appear just above the attorney's signature. RCP 6-7. Gregory's blood was drawn in September 1998 pursuant to that order.

Counsel later withdrew as the result of a conflict. A new attorney was appointed to defend Gregory in the rape case, and he moved to suppress the results

[31] Gregory does not seem to assert, nor has he pointed to another court that has adopted, a lesser standard than "closely related."

of the September 1998 blood draw, arguing that (1) the order had not been authorized by the defendant and (2) the order was not supported by probable cause. In response, the State moved for a second blood draw. The State presented an affidavit using only the information known to the State at the time of the first blood draw. The court found that probable cause supported the second blood draw and granted that motion. Gregory's blood was drawn pursuant to the second order in January 2000.[32]

In the murder case, Gregory brought a motion to suppress information gained from the two blood draws taken in the rape case, making the same arguments. MRP 699. The court determined that collateral estoppel compelled the conclusion that the September 1998 blood draw was the result of a proper agreed order and that the January 2000 order was supported by probable cause. MRP at 700. The court refused to suppress evidence resulting from the blood draws in the rape case.[33]

In this court, the defendant argues that the September 1998 blood draw was improper because he did not consent and the record is insufficient to conclude that he waived a substantive right. He also argues that the information presented to the trial court in the rape case did not establish probable cause and that it is irrelevant whether other information available to the State at that time would have established

[32] The trial court in the rape case eventually denied the motion to suppress the first blood draw. It determined that the order for the first blood draw was properly entered as an agreed order.

[33] Gregory also argued that the State may not, without a warrant, compare the defendant's DNA profile to evidence obtained in an investigation of a separate crime. The court disagreed.

probable cause. Gregory contends that the January 2000 blood draw should have been suppressed because it was the fruit of the first unlawful blood draw and it was not supported by probable cause. Finally, Gregory asserts that evidence obtained from both blood draws should have been suppressed in the murder case because he maintained an expectation of privacy in his DNA profile under both the fourth amendment to the United States Constitution and article I, section 7 of the Washington Constitution such that a DNA profile obtained in the rape case could not be used in the murder prosecution.

Validity of the Blood Draw: Criminal Rule (CrR) 4.7(b)(2)(vi) allows the court, on a motion from the prosecuting attorney, to order the taking of a blood sample from the defendant. CrR 4.7(b)(2) is subject to constitutional limitations. Generally, a trial court's decisions regarding discovery under CrR 4.7 will not be disturbed absent manifest abuse of discretion. *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988). Yet while the determination of historical facts relevant to the establishment of probable cause is subject to the abuse of discretion standard, the legal determination of whether qualifying information as a whole amounts to probable cause is subject to de novo review. *In re Det. of Petersen*, 145 Wn.2d 789, 799-801, 42 P.3d 952 (2002).

In order to comply with the Fourth Amendment, an order for a blood draw pursuant to CrR 4.7(b)(2)(vi) must be supported by probable cause. *See United States v. Wright*, 215 F.3d 1020, 1025 (9th Cir.), *cert. denied*, 531 U.S. 969 (2000).

The United States Supreme Court has recognized that three requirements must be met to establish the reasonableness of a blood draw. *State v. Judge*, 100 Wn.2d 706, 711-12, 675 P.2d 219 (1984) (discussing *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)). "First, there must be a 'clear indication' that in fact the desired evidence will be found." *Id.* at 711-12 (quoting *Schmerber*, 384 U.S. at 770-71). The chosen test must also be reasonable and it must be performed in a reasonable manner. *Id.* at 712. In this case, Gregory does not challenge the reasonableness of the blood test or the manner in which the blood draws were performed.

The January 2000 Blood Draw: The prosecutor explained that after the September 1998 blood draw was challenged, the January 2000 blood draw was requested to eliminate any potential problems with the September 1998 blood draw.[34] The court granted the State's motion for the January 2000 draw before ruling on the admissibility of the September 1998 draw.

Gregory first argues that the January 2000 blood draw is fruit of the arguably unlawful September 1998 blood draw. Gregory was first definitively connected to the G.H. murder through the comparison of his September 1998 blood sample against the semen left at the G.H. murder scene. Gregory argues that the sole reason for conducting the January 2000 blood draw was to establish an independent,

[34] The prosecutor testified that Gregory was alleging ineffective assistance of counsel based on the signed order for the September 1998 blood draw. In addition, some of the tests on the first blood draw were conducted by a scientist who had recently been investigated and fired. These concerns prompted the motion for the second blood draw.

untainted connection between Gregory and the G.H. crime scene. He claims that if the September 1998 draw was unlawful, then the January 2000 blood draw is the "fruit[] of the poisonous tree." Appellant's Opening Br. at 114.

Gregory's assertion that the sole reason for conducting the January 2000 blood draw was to connect him to the G.H. murder is simply incorrect. Assuming for the sake of argument that the September 1998 blood draw was unlawful, Gregory's argument ignores the fact that the motion to compel the January 2000 blood draw occurred in the context of the rape case. The evidence presented to support the January 2000 blood draw consisted only of evidence and arguments relevant to the rape case that were available to the State in September 1998.

There were valid reasons, arising only from the rape case, for drawing Gregory's blood in 2000. It was the State's burden to prove each element of the crime beyond a reasonable doubt. *See Sandstrom v. Montana*, 442 U.S. 510, 520-21, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979). Initially, Gregory denied having had sexual intercourse with R.S., asserting an alibi defense, but then switched to a consent defense before trial. Given Gregory's inconsistent story, it made sense that the State would feel it necessary to establish that the swabs taken from R.S. contained Gregory's DNA. The trial judge also suggested there was a difference between the question of whether there was probable cause to draw Gregory's blood and whether the resulting evidence should be suppressed. Gregory could later move for suppression of the DNA results in the rape case based on relevance if he indeed

decided to present the defense of consent.

Gregory also argues that the January 2000 blood draw was an unreasonable search and seizure because it became unnecessary when the trial court eventually held that the September 1998 blood draw was valid. Gregory's arguments on this point are circular. On the one hand he argues that the 1998 blood draw was invalid. On the other he argues that because the 1998 blood draw was valid, the 2000 blood draw was unnecessary. Under the circumstances, the trial court acted reasonably in allowing the 2000 blood draw.

De novo review of the evidence available to the trial court in September 1998 shows that there was sufficient evidence to support probable cause to draw Gregory's blood in January 2000. The facts presented in the declaration in support of probable cause are unchallenged. The declaration established R.S.'s account of the events of August 21, 1998, including her allegations that she was raped by a man matching Gregory's description and who drove a car registered to Gregory. R.S. reported that the condom used by the rapist had broken and he had ejaculated several times. Police transported R.S. to the hospital where swabs were collected, some of which contained semen. Finally, Gregory told police he was at a friend's home at the time of the rape, but Gregory's friends could not confirm his whereabouts all evening. This information established probable cause to draw Gregory's blood in order to determine whether he deposited the semen collected during R.S.'s hospital visit. We conclude that the January 2000 blood draw was

supported by probable cause and was valid.

September 1998 Blood Draw: Gregory's DNA remained constant between the September 1998 and January 2000 blood draws and any tests performed on one blood sample could have been performed on both samples. *Russell*, 125 Wn.2d at 38 ("[A] given person's DNA . . . remains the same throughout life."). We have found that the January 2000 blood draw was valid, and all of Gregory's DNA profile results could have been obtained from that untainted source. *See State v. Warner*, 125 Wn.2d 876, 889, 889 P.2d 479 (1995) ("Absolute inevitability of discovery is not required but simply a reasonable probability that evidence in question would have been discovered other than from the tainted source."); *see also State v. Wilson*, 132 Md. App. 510, 752 A.2d 1250, 1269 (2000) (explaining that the defendant's DNA signature is the common denominator, regardless of which blood sample is used to read that signature). Thus, all DNA results would have been inevitably discovered and no evaluation of the September 1998 blood draw is necessary.

Comparison of DNA with Evidence from an Unrelated Crime: Gregory contends that even if his blood was validly collected, it violates either the Fourth Amendment or article I, section 7 of the Washington Constitution to use DNA evidence in the State's possession in the rape case, to prove that Gregory committed an entirely separate crime. Essentially, Gregory argues that he has an expectation of privacy in the information contained in his blood, namely his DNA profile, and a

separate probable cause determination was required to support its comparison with the semen collected from the G.H. crime scene. Because there was no such independent probable cause determination, he contends that the DNA evidence should have been suppressed in the murder trial.

Fourth Amendment: The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The application of the Fourth Amendment depends upon whether the person invoking its protection can claim a legitimate, objectively justifiable expectation of privacy that has been invaded by the State. *Smith v. Maryland*, 442 U.S. 735, 740, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979). Gregory asserts that he has an ongoing privacy interest in the characteristics of his DNA such that the State must obtain a warrant to compare his DNA profile with material collected in connection with an unrelated crime.

While this court has not directly addressed this question, we recently held that once a suspect's *property* is lawfully in the State's control, the State may perform forensic tests and use the resulting information to further unrelated criminal investigations, without violating the owner's Fourth Amendment rights. *State v. Cheatam*, 150 Wn.2d 626, 638, 81 P.3d 830 (2003). In *Cheatam*, the defendant asserted that police violated the federal and state constitutions when, acting without a warrant, they retrieved Cheatam's tennis shoes from a jail property bag several days after Cheatam had been arrested on an unrelated charge. *Id.* at 633-34. We

recognized that most courts have determined that

> once an inmate's property is taken from him or her and inventoried and placed in a property room, the inmate's expectation of privacy is substantially or entirely reduced to the point that no constitutionally protectable interest remains. Thus, a "second look" at an inmate's inventoried property in connection with investigation of a crime unrelated to the one for which the defendant is arrested does not violate the constitution.

Id. at 636 (listing cases). Accordingly, we held that "once an inmate's personal effects have been exposed to police view in a lawful inventory search and stored in the continuous custody of the police, the inmate no longer has a legitimate expectation of privacy in the items free of further governmental intrusion." *Id.* at 638.

While unique requirements must be met to support a blood draw, Gregory has failed to adequately explain why, after the blood draw is complete, a DNA profile that is lawfully in the State's possession should be treated differently from other items of a defendant's property with regard to subsequent criminal investigations.[35] Gregory's blood was drawn for the very purpose of conducting DNA analyses and

[35] Gregory points to one sentence in *State v. Olivas*, 122 Wn.2d 73, 856 P.2d 1076 (1993), to support his argument that the chemical analysis of a bodily fluids sample is a further intrusion of the suspect's privacy interests. *Id*. at 83. However, that sentence does not describe the holding of the *Olivas* court, but instead describes the appellants' arguments in that case. *Id*. at 83. The appellants in *Olivas* relied on *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989), which explained

> physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested [person's] privacy interests.

Id. at 616.

the resulting DNA profile was lawfully in the possession of police, regardless of which evidence that DNA profile was being compared against, swabs from R.S.'s rape kit or samples from the G.H. crime scene. Gregory does not point to any court that has concluded that DNA evidence, lawfully in the possession of the State for the purposes of one criminal investigation, cannot be compared with evidence collected for the purposes of an unrelated criminal investigation. We conclude that once the suspect's DNA profile is lawfully in the State's possession, the State need not obtain an independent warrant to compare that profile with new crime scene evidence.[36]

Article I, Section 7: Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs . . . without authority of law." "'If no search occurs, then article I, section 7 is not implicated.'" *Cheatam*, 150 Wn.2d at 642 (quoting *State v. Young*, 123 Wn.2d 173, 181, 867

[36] Other states have consistently agreed. For example, in *People v. King*, 232 A.D.2d 111, 663 N.Y.S.2d 610 (1997), the New York Appellate Division concluded "[p]rivacy concerns are no longer relevant once the sample has already lawfully been removed from the body, and the scientific analysis of a sample does not involve any further search and seizure of a defendant's person." *Id*. at 614. "[O]nce constitutional concerns have been satisfied, a blood sample is not unlike other tangible property which can be subject to a battery of scientific tests." *Id*.

Similarly, the Georgia Court of Appeals has noted that once blood is lawfully obtained by the State, DNA results are like fingerprints that can be compared with evidence arising from unrelated crimes without any Fourth Amendment violation. *See Bickley v. State*, 227 Ga. App. 413, 489 S.E.2d 167, 170 (1997); *see also Wilson*, 752 A.2d at 1272 ("Once an individual's fingerprints and/or his blood sample for DNA testing are in lawful police possession, that individual is no more immune from being caught by the DNA sample he leaves on the body of his rape victim than he is from being caught by the fingerprint he leaves on the window of the burglarized house or the steering wheel of the stolen car.").

P.2d 593 (1994)). Whether a search has occurred depends upon "'whether the State has unreasonably intruded into a person's "private affairs."'" *Id.* (quoting *State v. Boland*, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990)). The inquiry is broader under the state constitution than under the Fourth Amendment. *Id.*

The *Cheatam* court held that once police have lawful possession of a piece of a suspect's property, "the inmate has lost any privacy interest in those items that have already lawfully been exposed to police view. He or she is no longer entitled to hold a privacy interest in the already searched items free from further governmental searches" *Id*. The *Cheatam* court explained that "one's privacy interest does not change depending on which crime is under investigation once lawful exposure has already occurred." *Id.* Because Cheatam's shoes were lawfully searched when booking occurred, Cheatam had no ongoing privacy interest in them, even under the Washington Constitution. *See id.* at 642-43.

We follow the reasoning of *Cheatam* and conclude that article I, section 7 is not implicated here because no additional search occurs when a defendant's DNA profile already in the State's possession is compared against evidence taken from a new crime scene. Gregory's DNA profile had already been lawfully exposed to the police; thus, its comparison against evidence from a new crime scene did not constitute a search under article I, section 7.[37] Article I, section 7 of the Washington

[37] Gregory cites to former WAC 446-75-030 (1991) for his proposition that a DNA profile established as part of one investigation could be used only in the case for which the DNA was originally analyzed. Chapter 446-75 WAC governs DNA procedures for the Washington State Patrol, specifically providing for collection and maintenance of a

Constitution does not require a different result than our Fourth Amendment analysis in this case.

Frye Hearing and DNA Evidence

Washington has adopted the *Frye* test for evaluating the admissibility of new scientific evidence. *State v. Cauthron*, 120 Wn.2d 879, 886, 846 P.2d 502 (1993) (citing *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923)). The primary goal is to determine "whether the evidence offered is based on established scientific methodology." *State v. Gore*, 143 Wn.2d 288, 302, 21 P.3d 262 (2001). Both the scientific theory underlying the evidence and the technique or methodology used to implement it must be generally accepted in the scientific community for evidence to be admissible under *Frye*. *Id*. "If there is a *significant* dispute among *qualified* scientists in the relevant scientific community, then the evidence may not be admitted," but scientific opinion need not be unanimous. *Id*.

Once a methodology is accepted in the scientific community, then application of the science to a particular case is a matter of weight and admissibility under ER

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databank for DNA identification of convicted felons. *See* former WAC 446-75-060 (1991). In addition, Washington State Patrol labs conduct DNA analysis to support criminal investigations conducted by various law enforcement agencies across the state. *See* former WAC 446-75-030(1). Within this context, former WAC 446-75-030(2) read "DNA identifications made in response to a criminal investigation shall not be entered into any permanent or temporary databank. Such results shall be returned to the requesting agency." When a local law enforcement agency asked the state patrol to conduct a DNA analysis for a local criminal investigation, the resulting DNA identification could not be entered into the state patrol's databank; it had to be returned to the requesting agency. However, this regulation did not state that a DNA identification or profile cannot be compared with evidence collected in a different investigation. Therefore it did not create an expectation of privacy in a suspect's DNA profile once an investigating agency lawfully had that profile in its possession.

702, which allows qualified expert witnesses to testify if scientific, technical, or other specialized knowledge will assist the trier of fact. ER 702; *see also State v. Copeland*, 130 Wn.2d 244, 263, 272, 922 P.2d 1304 (1996) (citing *Cauthron*, 120 Wn.2d 879). For example, once we conclude that it is generally accepted that genetic frequency calculations can be made from an adequate DNA database, then whether a particular database is large enough, representative of the relevant population, or of sufficient quality, are all matters of weight and admissibility under ER 702. *Id.* at 272-74. "DNA admissibility issues recur with some frequency and, needless to say, often involve time-consuming, expensive *Frye* hearings." *Gore*, 143 Wn.2d at 304-05. Therefore, courts should analyze scientific evidence under ER 702 whenever possible. In Washington, whether a given scientific technique has been performed correctly in a particular instance, i.e., whether laboratory error has occurred, goes to its weight, not admissibility. *Copeland*, 130 Wn.2d at 270; *Gentry*, 125 Wn.2d at 586.

At trial Gregory moved for a *Frye*/ER 702 hearing, but the trial court denied the motion because the State had established that the tests and methodologies used by the WSPCL and Forensic Science Associates (FSA) were generally accepted in the scientific community. On appeal, Gregory argues that the trial court should have conducted a *Frye* hearing because three aspects of the DNA testing are not generally accepted in the scientific community. Gregory raises no ER 702 issues.

Appellate review of a *Frye* ruling (issued after a *Frye* hearing) is de novo. It

is not clear what standard of review should be applied to a trial court's decision not to conduct a *Frye* hearing at all. Yet the trial court here declined to conduct a *Frye* hearing because it found that the scientific evidence has been generally accepted in the scientific community, the same question ultimately addressed on appeal *after* a *Frye* hearing. Thus, application of a de novo standard is appropriate.

First, Gregory contends that the use of a flatbed scanner to memorialize the typing strips produced during DQ-alpha and polymarker testing is not a generally accepted technique. The result of a DQ-alpha analysis of DNA is typing strip showing a series of blue dots. To determine whether two samples could have come from the same person, the scientist checks whether the samples have produced the same pattern of dots. *Russell*, 125 Wn.2d at 39. The strip itself will eventually turn blue and the results will fade in time. Therefore, the scientist in this case scanned the testing strips into a computer while they were still wet and printed the images to memorialize the strips. The strips revealed that the DNA from the vaginal swab matched Gregory's DNA. The odds of a random match were 1 in 2,500 in the African American population.

According to Gregory, the accepted protocol calls for Polaroid photography, rather than flatbed scanning. However, the trial court concluded that the use of the scanner did not implicate the underlying methodology of the DQ-alpha or polymarker testing, which this court has recognized as having been generally

accepted in the scientific community. *Gore*, 143 Wn.2d at 305. We agree. Gregory's chief complaint with the use of the flatbed scanner is that the analyst will be able to alter the intensity of the dots on the typing strip. Whether the analyst adjusted the dot intensity in a particular case is a question of what occurred in the laboratory during the test. Because the lab analyst can be cross-examined on this point, the issue goes to weight, not admissibility. *See Copeland*, 130 Wn.2d at 276 (holding an analyst's ability to override a computer, making a band fall within a five percent match window, goes to weight not admissibility). Gregory does not contend that the analyst in this case actually altered the dot intensity.

Second, Gregory asserts that the techniques used by FSA in its polymerase chain reaction (PCR)-based STR testing are not generally accepted. Samples taken from G.H.'s body and bedspread as well as Gregory's blood samples were subjected to PCR-based STR DNA testing using the profiler plus testing kit and capillary electrophoresis. Gregory's DNA profile matched the sperm found on G.H.'s bedspread and on and in her body. The odds of a random match were 1 in 190 billion in the African American population.

In *Gore*, this court concluded that PCR based DQ-alpha, polymarker, and D1S80 systems are generally accepted in the scientific community. *Gore*, 143 Wn.2d at 304-07. In the PCR procedure, enzymes are used to locate and replicate "genes of interest." *Russell*, 125 Wn.2d at 38. The chosen genes are replicated billions of times, a process called amplification. *Id.* Then the amplified DNA is

either (1) flooded over a nylon membrane which has been treated such that different variations of the genes of interest (possible variations are called alleles) will show up as varying dots on the membrane, *id.* at 37-39, or (2) run through a gel where an electric current causes them to spread over the gel in a distinct manner depending on variations in the gene of interest (a process called gel electrophoresis). *See Gore*, 143 Wn.2d at 305-06. If two samples create the same pattern on the membrane or gel then there is a match, meaning they could have come from the same person. *Russell*, 125 Wn.2d at 39. The DQ-alpha and D1S80 systems have been approved by this court. *See Gore*, 143 Wn.2d at 305-07. In *Gore*, we concluded that a *Frye* hearing on admissibility of typing techniques is not necessary for PCR based systems, and we declined to require new *Frye* hearings each time new loci are involved in DNA testing. *Gore*, 143 Wn.2d at 305, 307.

STR testing is a type of PCR testing where different regions of the DNA are amplified by the PCR process. In its 1996 report, the National Research Council noted that STR testing is particularly appropriate for forensic use and many courts have held that STR testing is generally accepted in the scientific community. *See*, *e.g.*, *Troxell v. State*, 778 N.E.2d 811, 816 (Ind. 2002); *State v. Deloatch*, 354 N.J. Super. 76, 804 A.2d 604, 610-11 (2002) (noting that 48 states and the FBI use and recognize STR testing); *State v. Butterfield*, 2001 UT 59, 27 P.3d 1133, 1143 (2001); *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317, 325 (1998). While the amplified DNA here was separated by capillary electrophoresis, rather than gel

electrophoresis, other courts have recognized that capillary electrophoresis in STR testing is generally accepted in the scientific community. *See*, *e.g.*, *People v. Henderson*, 107 Cal. App. 4th 769, 131 Cal. Rptr. 2d 255, 267 (2003); *Butterfield*, 27 P.3d at 1144-45. Furthermore, use of the profiler plus testing kit, the kit used by FSA in this case, has also been found to be generally accepted in the scientific community. *See State v. Traylor*, 656 N.W.2d 885, 890, 900 (Minn. 2003); *Yisrael v. State*, 827 So. 2d 1113, 1114-15 (Fla. Dist. Ct. App. 2002); *Butterfield*, 27 P.3d at 1144-45. Finally, Gregory does not dispute the trial court's findings that "[h]undreds of scientific articles have been published regarding the use of STR technology," and "[t]he use of STRs has been extensively validated in inter-laboratory comparisons conducted throughout the world." MCP at 2952; *see also Traylor*, 656 N.W.2d at 892-93 nn.5, 6 (listing articles).

Notably, Gregory does not cite to a single appellate case or scientific article that concludes that STR testing, use of the profiler plus testing kit, or capillary electrophoresis, is not generally accepted. He cites only to the testimony of Dr. Randall Libby, a defense expert whose conclusions this court has questioned before. *See Gore*, 143 Wn.2d at 309 n.9 (noting Dr. Libby's personal financial interest in having the courts hold that there is significant disagreement in the scientific community). We conclude that the STR techniques used in this case are generally accepted in the scientific community and no *Frye* hearing was necessary here. While Gregory complains that FSA failed to perform internal validation, there was

no evidence that FSA procedures compromised the test results in this case. Further, as noted, issues of laboratory error are properly the subject of cross-examination and go to weight not admissibility. *See Copeland*, 130 Wn.2d at 271.

Third, Gregory asserts that application of the product rule to the genotype frequencies used for STR analysis is not generally accepted in the scientific community. *See id.* at 264 (statistical evidence of genetic profile frequency probabilities must be presented to the jury). The product rule means that

> "the probability of a genetic profile occurring in the population is the product of the probabilities of each individual allele's occurrence in the population. Validity of the rule depends upon whether the individual alleles are actually statistically independent. . . . Two assumptions underlie use of the product rule when calculating genetic profile frequencies: linkage equilibrium, which means that the alleles at different loci are inherited independent of each other, and Hardy-Weinberg equilibrium, which means that one allele at a locus is not predictive of the other allele at that locus (one allele is inherited from the mother, the other from the father). Hardy-Weinberg equilibrium depends upon an assumption of a large population in which there is random mating.

Gore, 143 Wn.2d at 308 (quoting *Copeland*, 130 Wn.2d at 264-65 (citations omitted)). Gregory asserts that because these determinations are dependent upon the particular loci used in the DNA test, prior holdings that the product rule could be applied to the results of particular PCR based tests cannot govern whether the product rule can be used with STR tests. Because defense expert, Dr. Laurence Mueller,[38] raised questions about linkage equilibrium in STR databases, Gregory contends the trial court should have conducted a *Frye* hearing on this issue.

[38] We have also questioned testimony from Dr. Mueller. *Gore*, 143 Wn.2d at 309 n.9.

However, this court has already held that whether a particular database is large enough, representative of the relevant population, or of sufficient quality are all matters of weight and admissibility under ER 702. *Copeland*, 130 Wn.2d at 272-74. Similarly, questions concerning linkage equilibrium in STR databases would be more properly discussed by experts at trial whose testimony has been evaluated under the ER 702 standard. Based on this court's prior case law and our preference for evaluation of evidence under ER 702, we conclude that the trial court did not err in declining to hold a *Frye* hearing in this case.

Admission of Evidence That Gregory Possessed a Buck Knife

During the murder trial, the trial court admitted into evidence a Buck knife found in Gregory's car during the 1998 rape investigation. A Pierce County medical examiner testified at trial that this knife could have inflicted the stab wounds in the murder case. But on cross-examination, he also agreed that "there are thousands of instruments that could possibly have caused those injuries." MRP at 5383. In addition, a witness for the defense testified that he gave the defendant the knife in 1997, *after* the G.H. murder. MRP at 6507-08. Gregory argues that the knife was not relevant to the case and its admission chilled his constitutional right to bear arms.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less

probable than it would be without the evidence." ER 401. The threshold to admit relevant evidence is low and even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). A trial court's relevancy determinations are reviewed for manifest abuse of discretion. *Bell v. State*, 147 Wn.2d 166, 181-82, 52 P.3d 503 (2002). In this case, Gregory's objections were based on the absence of direct evidence that the knife was used to commit the murder. However, these objections went to weight, not admissibility. We conclude that the trial court did not abuse its discretion when it admitted the knife.

Gregory relies on *Rupe*, for the proposition that reference to his ownership of the knife improperly chilled his right to bear arms. 101 Wn.2d 664. However, the facts of *Rupe* are clearly distinguishable from the instant case. In *Rupe*, the prosecutor sought to admit evidence of Rupe's gun collection in the penalty phase of the capital trial specifically to emphasize that Rupe was a dangerous man. *Id.* at 703-04. The *Rupe* court found that because the defendant was constitutionally entitled to possess the weapons, "without incurring the risk that the State would subsequently use the mere fact of possession against him in a criminal trial *unrelated to their use*," due process prohibited their admission. *Id*. at 707 (emphasis added). The *Rupe* court emphasized that the gun collection was wholly unrelated to the crime. *Id.* at 706-07. Here the State sought to connect the knife with the murder at issue *in this case*. We conclude that admission of the knife did

not chill any constitutional right.

Testimony That Gregory Refused to be Tape Recorded or Give a Formal Statement

During the November 1998 interview, Gregory declined to be tape recorded. At trial the prosecutor asked DeVault, "[d]uring that [interview], did you ask him if you could record your conversation with him?" MRP at 6005. Defense counsel objected as to relevance. The jury was excused, and the prosecutor replied that lack of a tape recording would be relevant "if there is any attack at all regarding the accuracy or veracity of the reported statements by Detective DeVault." MRP at 6006. The defense noted that it had not challenged the contents of DeVault's statement and argued again that the refusal to be tape recorded was not relevant. The trial court concluded that the testimony was admissible. DeVault testified that "[Gregory] didn't want the conversation recorded. He didn't trust the recordings." MRP at 6015. Later, the prosecutor asked, "[d]id you ask [Gregory] that day if he wished to give you a formal statement about that case?" MRP at 6019. DeVault replied, "I continued to try to get him to talk to me about it. I asked him if he would like to give a formal statement, with or without the recorder, and he declined to do so." MRP at 6019. This exchange did not draw an objection. Gregory does not point to any instance where the prosecutor referred to this testimony in closing arguments.

Gregory now argues that DeVault's testimony improperly commented on his

right to remain silent. Because this argument is raised for the first time on appeal, Gregory must establish that the alleged constitutional error was manifest. RAP 2.5(a). Yet, it is unclear how DeVault's testimony implicates Gregory's Fifth Amendment right to remain silent where Gregory did not remain silent. Although he declined to be tape-recorded, he discussed the crime with DeVault, denying ever having been inside G.H.'s house or ever having sex with her. Gregory does not seem to have refused to answer any question posed to him. While Gregory attempts to draw a comparison between this case and *State v. Silva*, 119 Wn. App. 422, 81 P.3d 889 (2003), *Silva* involved a defendant who answered preliminary questions, but then refused to answer more incriminating questions about the crime. *Id.* at 426-27. The detective in *Silva* testified that when confronted with specific incriminating facts during the interview, he expected Silva to affirm or deny those facts, but instead *Silva* remained silent and did not answer the question. *Id.* While Silva clearly exercised his Fifth Amendment right to remain silent, Gregory does not establish that his refusal to be recorded or make a formal statement implicates the Fifth Amendment right where there was no testimony that Gregory ever refused to answer a question.

Gregory also argues that DeVault's testimony commented on a statutory right not to be recorded without his consent and that such a comment violates due process. RCW 9.73.030 states that, except as otherwise provided in the statute, the State may not record any private conversation without first obtaining the consent of

all parties. RCW 9.73.030(1)(b). Gregory asserts that the statute creates a right to decline to be recorded which cannot be commented upon at trial. *See State v. Carneh*, 153 Wn.2d 274, 289, 103 P.3d 743 (2004) (listing cases in which Washington courts have held that the State may not invite the jury to infer guilt from the exercise of a statutory privilege). Even assuming Gregory is correct that the statute creates the described right, testimony constitutes an improper "comment" on a right only if the State invites the jury to infer guilt from the exercise of the right. *See id.* at 289-90; *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996) ("A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt."); *State v. Henderson*, 100 Wn. App. 794, 798, 998 P.2d 907 (2000) ("'Comment' means that the State uses the accused's silence to suggest to the jury that the refusal to talk is an admission of guilt."). Here, DeVault's testimony regarding Gregory's refusal to give a formal statement or allow recording was not mentioned in closing arguments nor was it used to imply guilt. The prosecutor asked the question to defend against any attack on the accuracy or veracity of the reported statements. We conclude that the testimony did not amount to a comment even if RCW 9.73.030 created the suggested statutory right, nor did the testimony implicate Gregory's Fifth Amendment right to remain silent.

Testimony and Argument Regarding Gregory's Failure to Contact DeVault

The State asserted at trial that soon after G.H.'s murder, Detective DeVault

asked Mae Hudson, Gregory's grandmother, to have Gregory contact the detective. The State sought to question Hudson about this fact. Defense counsel argued that such testimony would improperly comment on Gregory's Fifth Amendment right to prearrest silence. When Hudson testified, she denied ever having been asked to give such a message to Gregory. Later in the State's case, DeVault testified that although Gregory was not home when he initially canvassed the neighborhood, he left a business card with Hudson and asked her to pass a message to Gregory that the detective wished to talk to him. He also explained that Hudson later reported that she had relayed the message. That testimony drew a hearsay objection which was sustained. Defense counsel did not make any other objection to this portion of DeVault's testimony. DeVault then explained that he contacted Gregory at the Hudson home three days after G.H.'s body was found. Based on this testimony, the prosecutor, during closing, argued:

> [Gregory] is not there when the detectives go to talk to him. His grandmother is. It's not necessarily suspicious that the defendant isn't there when the detectives go to talk to him. But three days go by after Detective DeVault says to Ms. Hudson, [p]lease have Allen Gregory give us a call. No word. By the time Detective DeVault goes out to Mae Hudson's house to talk to Allen Gregory, the defendant knows that his grandmother has told the police that he was not home when she checked the bedroom at about 1:30 in the morning on the night of the killing.

MRP at 6714.

The only unsuccessful defense objection was to the questioning of Mae Hudson, and that questioning produced only Hudson's denial that DeVault had asked her to pass a message to Gregory. Defense counsel did not object to

DeVault's testimony on Fifth Amendment grounds, and he did not object to the prosecutor's closing argument. Without objection at trial, reversal based on either is warranted only if there has been a manifest error affecting a constitutional right. RAP 2.5(a). "[T]he appellant has the burden to demonstrate that the alleged error actually affected his or her rights. '[I]t is this showing of *actual prejudice* that makes the error "manifest", allowing appellate review.'" *State v. McNeal*, 145 Wn.2d 352, 357, 37 P.3d 280 (2002) (quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

This court has been clear that the State may not comment on the accused's exercise of his Fifth Amendment prearrest right to remain silent. *See State v. Sweet*, 138 Wn.2d 466, 480-81, 980 P.2d 1223 (1999); *Lewis*, 130 Wn.2d at 705-06; *Crane*, 116 Wn.2d at 331. However, not all remarks amount to a "comment" on the exercise of a constitutional right. *Sweet*, 138 Wn.2d at 481; *Lewis*, 130 Wn.2d at 706. In *Crane*, we characterized the issue as "whether the prosecutor manifestly intended the remarks to be a comment on that right." *Crane*, 116 Wn.2d at 331. The *Crane* court then noted that a prosecutor's statement will not be considered a comment on a constitutional right to remain silent if "standing alone, [it] was 'so subtle and so brief that [it] did not "naturally and necessarily" emphasize defendant's testimonial silence.'" *Id.* (second alteration in original) (quoting *State v. Crawford*, 21 Wn. App. 146, 152, 584 P.2d 442 (1978)). Then, in *Lewis*, we concluded that "[a] comment on an accused's silence occurs when used to the

State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." 130 Wn.2d at 706-07 (citing *Tortolito v. State*, 901 P.2d 387, 390 (Wyo. 1995)).

Under *Crane* and *Lewis*, DeVault's testimony and the prosecutor's reference in closing argument to the fact that Gregory failed to contact DeVault for three days did not amount to comments on prearrest silence. Gregory did not refuse to talk with police; to the contrary, he freely discussed with DeVault his whereabouts on the night in question. The State explains that DeVault's testimony was offered to explain the investigative process in this case, not to comment on Gregory's delay in contacting police. The prosecutor's argument implies that the delay gave Gregory time to make his story consistent with the statement given by his grandmother, but it does not imply that he was avoiding the police because he was guilty. Furthermore, the prosecutor's argument regarding suspiciousness was so subtle and brief that it did not naturally and necessarily emphasize any testimonial silence. Neither the testimony nor the argument amounted to a comment on Gregory's right to remain silent.

Prosecutorial Misconduct During Guilt Phase Closing Argument

Gregory contends that during closing argument, the prosecutors committed misconduct by improperly denigrating defense counsel, arguing facts not in evidence, and improperly shifting the burden to the defense. The defendant bears

the burden of showing that the prosecutor's remarks were improper. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Even if the defendant does so, the error does not require reversal unless "the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict." *Id.* at 718-19. A defendant's failure to object to a prosecutor's improper remark constitutes a waiver, unless the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice" that could not have been cured by an instruction to the jury. *Id.* at 719; *see also Gentry*, 125 Wn.2d at 596; *Hoffman*, 116 Wn.2d at 93.[39] Where the defendant objects and requests a curative instruction or moves for a mistrial, we give deference to the trial court's ruling because it is in the best position to evaluate whether the prosecutor's comment prejudiced the defendant. *Stenson*, 132 Wn.2d at 719. Allegedly improper comments must be viewed in the context of the entire argument, and a prosecutor enjoys wide latitude "in drawing and expressing reasonable inferences from the evidence." *Gentry*, 125 Wn.2d at 641.

Comments Regarding Cross-Examination of Dr. Brown: Dr. Brown, formerly of the WSPCL, testified at Gregory's trial. In an earlier, unrelated case, Dr. Brown conducted an RFLP test and drafted a report for his coworker to review. The coworker noted a mistake, which Dr. Brown then corrected. When questioned

[39] While Gregory argues that he should not have been expected to object at trial and draw attention to the prosecutor's comments, a tactical decision not to object does not change the analysis. *State v. Smith*, 144 Wn.2d 665, 679-80, 30 P.3d 1245, 39 P.3d 294 (2001).

during an interview with defense counsel in that case, Brown lied to cover up the mistake. During cross-examination here, Gregory's defense counsel focused, in part, on this incident and Brown's subsequent resignation.

In closing, the prosecutor remarked that the defense strategy in this case was "to attack the scientists personally." MRP at 6724. The prosecutor argued:

> John Brown is the perfect example of how the defense tactic in DNA cases has changed, because John Brown suffered an unbelievable attack personally. It wasn't professional. It was personal.

MRP at 6727. Defense counsel objected. The court sustained and ordered this argument to be stricken from the record. The prosecutor then argued:

> John Brown was questioned about every single thing except his work in this case. What does that tell you? Distract, deflect, divert, get your attention away from the work that John Brown did in this case so maybe you won't see how well it was done, so maybe you won't see how much it matches and how much the defendant committed this crime.

MRP at 6727. There was no objection to this argument.

Where the defense failed to object, we must determine whether the argument was so flagrant and ill-intentioned that it resulted in an enduring prejudice that could not be obviated by a curative instruction. *Stenson*, 132 Wn.2d at 719. "[T]he prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." *Russell*, 125 Wn.2d at 87. In *Russell*, this court evaluated a prosecutor's statement that the defense had "'attacked and vilified'" a DNA expert. *Id.* at 92 (quoting Verbatim Report on Appeal at 7289). The *Russell* prosecutor

argued that defense counsel would "'stoop to any level'" to call scientific evidence into question. *Id.* The *Russell* court found that the prosecutor's remarks "appear to have been provoked by defense counsel and arguably constitute a fair response to attacks made by the defense on the deputy prosecutor, her witnesses, and the work of government agents." *Id.* at 93. The court held that "[w]hile inflammatory, the remarks were not so prejudicial that a curative instruction would have been ineffective." *Id.*

We conclude that the prosecutor's remarks in this case were no worse than the prosecutor's remarks in *Russell.* The trial court struck from the record the characterization of the attack on Brown as personal. Gregory has not shown that the trial court abused it discretion in crafting a remedy, especially where no further curative instruction was requested. The prosecutor's other remarks, arguing that the defense was trying to divert the jury's attention away from the DNA evidence, seem to be a fair response to defense counsel's cross-examination of Brown. While Gregory points to various other cases in which courts have found due process violations, those cases are distinguishable in that they involve characterizations of defense counsel as liars. *See* Appellant's Opening Br. at 139-40 (listing cases). Prosecutors in this case simply did not go so far.

Facts not in Evidence: Gregory also argues that the prosecutor argued facts not in evidence and misstated the evidence presented to the jury. Specifically, he contends that the prosecutor improperly referred to the population of the United

States and the world, the prosecutor improperly argued that the results of the three DNA tests could be combined to create a single probability of a random match, and the prosecutor improperly listed nonforensic uses for DNA testing. Notably, the defense did not object to any of the above challenged statements during closing argument. Therefore, we must determine only whether the prosecutor's comments were so flagrant and ill-intentioned that an enduring prejudice resulted such that a curative instruction could not have been effective. *Stenson*, 132 Wn.2d at 719.

Population Statistics: During closing argument, the prosecutor referred to testimony that the chance of a random match between the defendant and the DNA left at the scene under the RFLP test was "1 in 325 million, roughly the population of the United States." MRP at 6729. The prosecutor also repeated that the chances of a random match between Gregory and the crime scene DNA under the STR test was "1 in 180 billion people," which amounted to "[r]oughly 30 times the population of the world." MRP at 6732.[40] The State acknowledges that there was no evidence presented at trial as to the populations of the United States or the world, but in argument, the parties are granted wide latitude in drawing inferences from the evidence, and Gregory does not show that the argument was flagrant and ill-intentioned. *See Gentry*, 125 Wn.2d at 641. The jury instruction explaining that the

[40] Actually, for the RFLP test, the chance of a random match in the African American community was 1 in 235 million, and for the STR test, the chance of a random match in the African American community was 1 in 190 billion, but Gregory does not assert prejudice resulted from these errors.

jury must not consider facts not in evidence would have cured any error. Therefore, these statements do not warrant reversal.

Additional Application of the Product Rule: During closing argument, the State combined the results of all three types of DNA testing by multiplying the results of each, using the product rule:

> What are the odds of a person having the six locations that match between Allen Gregory and the vaginal swabs using DQ-Alpha, the six locations between the defendant and the bedspread sperm RFLP, and the nine locations on all of the evidence and the defendant using STRs, 1 in 2,500, times 1 in 325 million, times 1 in 180 billion. It's a 5-digit number with 19 zeroes after it. That's the chance. That's the odds of somebody else besides this defendant raped and murdered [G.H.].

MRP at 6733. Gregory now argues that there was no evidence that the product rule can properly be applied across results obtained from different DNA tests. However, the State is entitled to draw reasonable inferences from the evidence, and again, Gregory has not shown that the argument was flagrant or ill-intentioned. Finally, there was evidence that the odds of a random match were at least 1 in 180 billion. The odds were already so high as to virtually eliminate the chances of a random match such that this argument would not have prejudiced the defense.

Other Uses for DNA Evidence: Finally, Gregory argues that the prosecutor improperly referred to other high stakes uses of DNA testing. Specifically, the prosecutor noted that DNA testing has been used in medical diagnosis and transplant procedures and identification of casualties of war, victims of the Oklahoma City bombing, and victims of plane crashes. The prosecutor then

emphasized the trustworthiness of DNA testing. While Gregory argues that this comment was not supported by evidence at trial, one of the scientists testified, without objection, that PCR and RFLP testing have been used in "medical research and diagnostic transplant, organ research, the identification of war dead, the identification of remains in the Oklahoma City bombing and plane crashes." MRP at 4714. Any minor departure from the actual testimony is not enough to warrant reversal here.

Comment on the Missing Witness: Gregory also asserts that the prosecutor improperly shifted the burden of proof by commenting that the defense failed to call Mike Barth, G.H.'s ex-boyfriend, whom the defense suggested had actually killed G.H. The prosecutor argued:

> Now the defense didn't call Mike Barth. They didn't call him and say, Did you kill her? The state didn't call him either. The state did one better. The state called in his biological evidence, confirmed it with the evidence at the murder scene, and there isn't any chance at all.

MRP at 6723.[41] The "missing witness doctrine" allows a prosecutor to comment on the defendant's failure to call a witness in certain circumstances:

> Under this doctrine, where a party fails to call a witness to provide testimony that would properly be a part of the case and is within the control of the party in whose interest it would be natural to produce that testimony, and the party fails to do so, the jury may draw an inference that the testimony would be unfavorable to that party.

Cheatham, 150 Wn.2d at 652. However, this court has held that the missing

[41] The State asked Barth to produce a blood sample to exclude him as the donor of the DNA left at the scene of the crime, Barth agreed, and he was excluded.

witness doctrine is limited; "the inference is not available if the witness's testimony would necessarily be self-incriminatory if favorable to the party who could have called the witness." *State v. Blair*, 117 Wn.2d 479, 489-90, 816 P.2d 718 (1991). The missing witness doctrine would not apply here where, if Barth's testimony were favorable to Gregory, it would have incriminated Barth.

Even though the missing witness doctrine does not permit the argument in this case, Gregory has not shown how the prosecutor's comment was prejudicial. *See Blair*, 117 Wn.2d at 491. In fact, during closing argument, the prosecutor discussed the State's burden of proof. Defense counsel never requested a curative instruction, which could easily have reminded the jury of the proper burden of proof. The comment was not so flagrant and ill-intentioned that it would have resulted in enduring prejudice. *Stenson*, 132 Wn.2d at 718-19. We conclude that none of the challenged closing arguments amount to misconduct.

Viewing of the Videotape During Deliberations

One of the exhibits admitted at trial was an edited copy of a video of the crime scene. Outside of the presence of the jury, the trial court asked if the defense had any objections to the jury replaying the video during deliberations. The defense replied that it had no objection. The trial court also mentioned that the jury might be able to use the courtroom for deliberations. The defendant was present during discussion of both of these matters.

During the first day of deliberations for the guilt phase, March 20, 2001, the

jury notified the judicial assistant that they wished to view the video. The viewing equipment was in the courtroom with the power cords secured to the floor. The judicial assistant made sure the courtroom doors were locked, then escorted the jury into the courtroom. The judicial assistant exited the courtroom and remained outside in a hallway where he could see the jurors but could not see what they were watching or hear what was being said. After the jury returned to the jury room, the judicial assistant closed the door to the jury room and then unlocked the doors to the courtroom.

Gregory now asserts that his constitutional right to be present at all critical stages of his criminal proceeding was violated when the judicial assistant allowed the jury to replay the video during guilt phase deliberations. Gregory also contends that the judicial assistant had ex parte contact with the jury. Because the hearing was not recorded and because the defendant was not notified until afterward, Gregory argues that the action amounted to constitutional error, which the State cannot demonstrate was harmless.

This court has recognized that in the eyes of the jury, the bailiff is an agent of the trial judge. *See State v. Bourgeois*, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997). Therefore, when an ex parte communication takes place between the bailiff and the jury "that relates to an aspect of the trial" the trial judge should generally disclose the communication to counsel for all parties. *Id.* Although an improper communication between the court and the jury amounts to constitutional error, it is

subject to the harmless error analysis. *Id.*

Here, Gregory cites to various cases in which bailiffs or judges have engaged in or allowed improper communications with the jury. *See*, *e.g.*, *State v. Caliguri*, 99 Wn.2d 501, 505, 664 P.2d 466 (1983) (trial court had FBI agent replay tapes for the jury, including portions that were not played at trial); *O'Brien v. City of Seattle*, 52 Wn.2d 543, 546-47, 327 P.2d 433 (1958) (bailiff allegedly discussed a jury instruction with the jury). However no such improper communication occurred here. The bailiff merely facilitated the use of the courtroom video equipment and ensured that the jury would not be interrupted.

Gregory also argues that the trial court erred in allowing the jury to play the tape during deliberations without Gregory present. CrR 6.15(e) provides that when the jury retires for deliberation, it "shall take with it the instructions given, all exhibits received in evidence and a verdict form or forms." Accordingly, we have held that the jury can take into deliberation tapes that have been admitted into evidence. *State v. Elmore*, 139 Wn.2d 250, 294-96, 985 P.2d 289 (1999) (discussing *State v. Castellanos*, 132 Wn.2d 94, 935 P.2d 1353 (1997)). Unrestricted access to recordings during deliberations does not place undue emphasis on the tape. *Id.* at 295. While the above cases involved audiotapes, the same principles should apply to videotapes.

Gregory distinguishes this case on the fact that the viewing occurred in the courtroom. However, the jury was alone when viewing the videotape,

distinguishing this case from those where the jury was accompanied by a government agent. *See Caliguri*, 99 Wn.2d at 505; *United States v. Kupau*, 781 F.2d 740, 742-43 (9th Cir. 1986). The tape viewed by the jury was the same one admitted into evidence at trial, distinguishing it from cases in which the jury gained access to new information during deliberations. *See United States v. Noushfar*, 78 F.3d 1442, 1444-45 (9th Cir. 1996). The only reason the viewing did not occur in the deliberation room was that the cords to the video equipment had been attached to the courtroom floor. There is no reason to distinguish this case from *Castellanos* and *Elmore*. The trial court did not abuse its discretion when it allowed the jury to review an admitted videotape exhibit during deliberations.

Conclusion

Finding no constitutional violation or other error during the guilt phase of the murder trial, we conclude that Gregory's cumulative error argument also fails. We affirm the murder conviction.

C. Murder Case Penalty Phase Analysis

Impact of Reversal of Rape Convictions

The defendant's rape convictions were admitted at the penalty phase in the murder trial. If the rape convictions had not existed at the time of the penalty phase, then the jury would not have considered them when deciding whether sufficient mitigating circumstances existed to avoid the death penalty. Because we reverse the rape convictions here, we must also reverse the death sentence and remand for resentencing.[42] But since the State may seek the death penalty at resentencing, the issues raised in this appeal may arise again. *See*, *e.g.*, *Rupe*, 108 Wn.2d at 738. Thus, we address Gregory's penalty phase claims of error below.

Penalty Phase Review

Following Gregory's conviction of aggravated first degree murder, the case proceeded to the penalty phase of the trial. We review assignments of error in the guilt phase of a capital case according to the same standards of review applicable in noncapital cases, but claims of error at the sentencing phase are given more searching scrutiny because the death penalty is qualitatively different from all other punishments. *State v. Benn*, 120 Wn.2d 631, 648, 845 P.2d 289, *cert. denied*, 510 U.S. 944 (1993). Procedural rules regarding arguments raised for the first time on appeal are also construed more liberally in the sentencing phase. *Lord*, 117 Wn.2d at 849.

[42] The State concedes that if the rape convictions are reversed, the death sentence must also be reversed. Consol. Br. of Resp't at 161.

Victim Impact Testimony

The State sought to present victim impact testimony from Lee Peden, G.H.'s mother. The court heard several motions regarding the scope of the victim impact testimony and eventually detailed the resulting limitations in an order, concluding that Peden would not be allowed to give her opinion of the defendant, her opinion as to the appropriate sentence, or her opinion of the crime. Peden would be allowed to describe "[G.H.], her interests, and her plans for the future." MCP at 2794. The court also permitted Peden to describe the impact on G.H.'s family; Peden could discuss her observations of the effects of the crime on family members, but she could not relate any statements made by them. Finally, the court limited the State to presenting six pictures of G.H. during various stages of her life.

During her testimony, Peden gave a brief overview of G.H.'s life, her interests and hobbies, and described the pictures that were entered into evidence. In part, Peden described how G.H. enjoyed Christmas:

> [Peden]: We always had a very large Christmas. Patty always came over. And we would have everybody there on Christmas morning, friends and family.
> [Prosecutor]: Where was this photo taken?
> [Peden]: This was taken at my home. We always had Christmas there, [G.H.'s] favorite holiday.
> We have not celebrated Christmas since her death.

MRP at 7250-51. The prosecutor then asked Peden to relate the impact that G.H.'s death had on her siblings. She replied:

> [Peden]: My son is very angry. It's really hard on him. He was raised with his two sisters. He married a young woman that has four sisters. He has

> four daughters and a granddaughter.
>
> *And what was done to his sister is something that, to him, is just unspeakable*. You don't—you know, his whole life is, women are to be protected, and you know, high regard. So for him, this has just brought such horrible anger for him. I feel bad for him. He can hardly talk about it.
> [Prosecutor]: And how about [G.H.'s] sister Mary?
> [Peden]: Well, Mary has had a terrible time with this too. She has been seeing somebody for quite some time now because she has nightmares about it and she is always dreaming that she is trying to save [G.H.] from something, but she doesn't know what. And she just wakes up and—

MRP at 7251 (emphasis added). Defense counsel objected and the court sustained the objection. The prosecutor then repeated the question, and Peden replied, "[s]he has had a real bad time. She really could use a sister right now. Her husband has terminal cancer." MRP at 7252. Defense counsel again objected, but the court overruled that objection. Peden then explained, "I miss her terribly. I just—it's all backwards. You are not supposed to bury your children. They are supposed to bury you. And I guess the suddenness of it and—it just makes it so much harder to bear. I just miss her so bad." *Id.*

After this testimony, the defense moved for a mistrial, arguing that it violated the pretrial order and the hearsay rule, and that Peden expressed an opinion of the crime, albeit through her son. In the alternative the defense asked for a curative instruction, which would have told the jury to ignore Peden's answers as to the impact of the crime on G.H.'s brother and sister. The trial court denied the motion, concluding that the testimony about her son's reaction to the crime did not amount to an opinion about the crime, nor did it amount to hearsay. Regarding the impact of the crime on Peden's daughter, the court noted that it had sustained one objection

because the testimony seemed to include hearsay. The next question and answer were proper and stayed within the confines of the court's order. Finally, the court concluded that the impact statement was no more inflammatory than testimony found admissible by the United States Supreme Court.

In *Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987), the United States Supreme Court evaluated the constitutionality of victim impact evidence that described the emotional trauma suffered by the family and the personal characteristics of the victim. *Id.* at 503. In a separate section of the opinion, the Court evaluated victim impact evidence that described the family members' opinions of the defendant and characterizations of the crime. *Id.* at 508. Admission of both types of victim impact evidence was deemed to violate the Eighth Amendment. *Id.* at 507-09. Then in 1991, the Court overruled *Booth*, in part, in *Payne v. Tennessee*, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), holding that certain victim impact evidence *can* be admitted:

> We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that *evidence about the victim and about the impact of the murder on the victim's family* is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

Id. at 827 (second emphasis added). Similarly, this court has found no per se bar to the introduction of impact statements in the penalty phase of a capital trial. *Gentry*, 125 Wn.2d at 617.

However, given the limited facts presented in *Payne*, this court has reasoned that the Eighth Amendment still prohibits the introduction of evidence and argument concerning "characterizations of the crime, the defendant, and *the appropriate punishment.*" *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). Moreover, if victim impact testimony "so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause." *Payne*, 501 U.S. at 831 (O'Connor, J., concurring). Thus, constitutional principles still limit the scope of victim impact testimony and "evidence introduced in capital cases [must] conform to the Rules of Evidence." *Gentry*, 125 Wn.2d at 622 (citing *State v. Bartholomew*, 101 Wn.2d 631, 639, 683 P.2d 1079 (1984)).

Here, Gregory argues that Peden's victim impact statement (1) was highly emotional and so infected the proceedings as to deny Gregory due process, (2) included hearsay testimony in violation of this court's holding in *Bartholomew*, 101 Wn.2d at 639, as well as the Sixth Amendment right to confrontation, and (3) expressed an opinion regarding the crime in violation of the Eighth Amendment and Washington's due process and cruel punishment clauses.[43]

[43] No argument was made to the trial court regarding Washington's due process and cruel punishment clauses or the Sixth Amendment. Therefore, to the extent that we evaluate these arguments, we do so under RAP 2.5(a)'s limitations on arguments raised for the first time on appeal. "[T]he appellant has the burden to demonstrate that the alleged error actually affected his or her rights. '[I]t is this showing of *actual prejudice* that makes the error "manifest," allowing appellate review.'" *McNeal*, 145 Wn.2d at 357 (second alteration in original) (quoting *State v. McFarland*, 127 Wn.2d at 333).

Emotional Character of the Testimony: In *Payne*, the defendant was convicted of murdering a 28-year-old mother and her 2-year-old daughter with a butcher knife. *Payne*, 501 U.S. at 811-13. Her three-year-old son managed to survive the assault, but was severely injured. *Id.* The facts of the crime were particularly gruesome and disturbing. *Id.* During the penalty phase of the trial, the State presented testimony from the children's grandmother. *Id.* at 814-15. When asked how the little boy had been affected by the murders, she replied:

> "He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, I'm worried about my Lacie."

Id. at 814-15 (quoting App. 3). Victim impact testimony can be so inflammatory as to render the sentencing proceeding fundamentally unfair, but the Court did not find the above testimony reached that threshold. *See id* at 827, 831 (O'Connor, J., concurring). The above testimony was brief and it "did not inflame [the jury's] passions more than did the facts of the crime." *Id.* at 832. Similarly, in *Gentry*, the young victim's father properly discussed his child's interests and plans for the future. *Gentry*, 125 Wn.2d at 617. He was also permitted to explain the impact of his daughter's murder on "his work, his emotions and his family." *Id.*

In this case, Peden's testimony discussed the family's sadness around Christmas, the victim's favorite holiday, and the impact on adult siblings. An objection was sustained when Peden tried to recount Mary's dreams. The testimony

here certainly was not more inflammatory than the testimony offered in *Payne* and *Gentry*. We conclude that it did not render the sentencing proceeding fundamentally unfair, and we find no due process violation.

Hearsay Testimony: In *Bartholomew*, 101 Wn.2d 631, we held that the due process clause of our state constitution requires the evidence introduced in capital cases to conform to the Rules of Evidence. *Id.* at 640-41. Therefore, victim impact testimony must comply with the hearsay rule. In this case, the court sustained a hearsay objection to testimony about the sister's dreams. However, the court admitted testimony regarding the impact of the crime on the brother. Specifically, Peden testified that the crime was "unspeakable" to him. "He can hardly talk about it." MRP at 7251.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801. Peden's testimony about her son describes her opinion as to his reaction to the crime, but it does not relate a *statement* made by him. Moreover, the information was presented not to prove the truth of the matter asserted, but to show the impact of the crime on G.H.'s brother. Therefore, the trial court correctly concluded that the testimony did not amount to hearsay.

Opinion About the Crime: Even after *Payne*, the Eighth Amendment still prohibits victim impact evidence that characterizes the crime, the defendant, or argues for a particular punishment. *Pirtle*, 127 Wn.2d at 672. "The admission of these emotionally charged opinions as to what conclusions the jury should draw

from the evidence clearly is inconsistent with the reasoned decisionmaking [required] in capital cases." *Booth*, 482 U.S. at 508-09

In *Booth*, the trial court admitted a report from a social worker that relayed the feelings of the victims' family members about the crimes. The victims' son explained that his parents had been "'butchered like animals.'" *Booth*, 482 U.S. at 508. The victims' daughter said that "'animals wouldn't do this.'" *Id*. The Court concluded that these statements should not have been admitted. *Id.* at 509. Gregory argues that the characterization of G.H.'s murder as unspeakable should have been excluded under the same reasoning.

But even if we assume that use of the term "unspeakable" improperly characterized the crime in violation of *Booth* and *Pirtle*, such an error is subject to harmless error analysis. *See Turrentine v. Mullin*, 390 F.3d 1181, 1200 n.2 (10th Cir. 2004) (stating that *Booth* error would be subject to harmless error analysis); *DeRosa v. State*, 2004 OK CR 19, 89 P.3d 1124, 1152 n.141 (2004). The jury in this case would undoubtedly have already been aware of the "unspeakable" nature of the crime, and Peden's statement here was fleeting compared with those made in *Booth.* We conclude that admission of this characterization of the crime did not amount to reversible error.

Presentation of Evidence Regarding Other Defendants and Other Crimes: The State moved to exclude evidence of other contemporaneous capital crimes, like the cases of Timothy McVeigh and Robert Yates. The defense argued that it should be

able to comment upon other "high publicity cases where the death penalty has been imposed as illustrations of the class of severe cases for which the death penalty should be reserved." MCP at 2683. In making this argument, Gregory did not rely upon any particular constitutional authority. The trial court excluded such evidence and argument, but both parties could still argue whether Gregory was "'the worst of the worst'" "so long as no individual person or facts of a particular case are mentioned." MCP at 2788.

Accordingly, the State argued in closing that the death penalty is not applicable in all cases of murder, not even all cases of first degree murder, and it is not applicable even in all cases of aggravated first degree murder. "This kind of decision is reserved for the worst of the worst. That's what this case is, the worst of the worst." MRP at 7711. The prosecutor then asked the jury to keep two questions in mind, "[i]f not now, then when? And if not Allen Gregory, then whom?" *Id.* Defense counsel did not object to this argument. A few moments later, the prosecutor again reminded the jury that "[w]e have said that there are some cases, the worst of the worst, where the death penalty should be imposed and it should be carried out." MRP at 7717. Again, there was no objection. In the context of a discussion about mercy, the prosecutor later urged the jury to "ignore comparisons whether or not this defendant's acts are more or less egregious than other persons in our country who have committed acts against humanity . . . [w]e are talking about the defendant's conduct and the defendant's conduct alone." MRP at

7741. In contrast, defense counsel argued, "[t]his is not the worst of the worst. The law tells you not to just look at the offense, but to look at the person too. This is not the worst of the worst." MRP at 7789.

Gregory now argues that the due process clauses of the federal and state constitutions, the Eighth Amendment, and the cruel punishment clause of the state constitution all grant the defendant wide latitude to present mitigating evidence at the penalty phase of a capital trial,[44] and thus, the trial court erred in preventing him from discussing other highly publicized death penalty cases. In *Lord*, this court evaluated a similar argument and held that during a death penalty sentencing phase, only "those circumstances that arise in connection with the specific crime and defendant" are relevant. 117 Wn.2d at 914. While Gregory relies on *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) and *Bartholomew*, 101 Wn.2d 631, for the proposition that mitigating evidence could include sentences handed down in other cases, *Lockett* in fact notes that "[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Lockett*, 438 Wn.2d at 604 n.12. Moreover, the *Bartholomew* court discussed the admission of "relevant" evidence in support of statutory and nonstatutory mitigating factors. *Bartholomew*, 101 Wn.2d at 642. The

[44] No argument was made to the trial court regarding any particular constitutional provisions. Therefore, to the extent that this court evaluates these arguments, it must do so under RAP 2.5(a)'s limitations on arguments raised for the first time on appeal.

Bartholomew court seemed to follow *Lockett*, holding "when a jury is faced with the question whether or not the defendant should be put to death, the defendant should be allowed to submit any evidence of his 'character or record and any of the circumstances of the offense . . .' to convince the jury that his life should be spared." *Bartholomew*, 101 Wn.2d at 646-47 (quoting *Lockett*, 438 U.S. at 604). Neither *Lockett* nor *Bartholomew* indicates that a trial court is required to admit evidence that does not bear on *this* defendant or *this* crime.

Gregory argues that even if the trial court properly excluded mention of other defendants' crimes and their corresponding punishments, the prosecutor's reference to "the worst of the worst" violated due process. However, this court has allowed similar arguments in capital cases, despite their dramatic character. *See Brown*, 132 Wn.2d at 568-69. Gregory also points to United States Supreme Court cases holding that a defendant may not be sentenced to death on the basis of information which he had no opportunity to deny or explain. Appellant's Opening Br. at 156-57 (citing *Simmons v. South Carolina*, 512 U.S. 154, 164-65, 114 S. Ct 2187, 129 L. Ed. 2d 133 (1994) (discussing *Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986) and *Gardner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977)). However, the evidence at issue in each of these cases was evidence that related to *that* defendant, the circumstances of *that* crime, or the sentencing alternatives in *that* particular case. *See Simmons*, 512 U.S. at 161-62 (defendant was erroneously prohibited from showing that if spared the death

penalty, he would not be eligible for parole); *Skipper*, 476 U.S. at 4-5 (defendant was erroneously prohibited from introducing evidence of his good behavior in prison to rebut the argument of future dangerousness); *Gardner*, 430 U.S. at 362 (defendant was erroneously prohibited from viewing a presentence report prior to trial and thus he was unable to deny or explain the information contained therein). The information that the defendant sought to introduce in this case was not relevant to Gregory, *his* crime, or the specifics of *his* sentencing alternatives. Washington's death penalty scheme clearly assigns the task of proportionality review to this court, not the jury in a penalty phase. RCW 10.95.130(2)(b). Gregory does not present sufficient authority to support introduction of evidence regarding sentences imposed upon other murderers. He also does not establish that the prosecutor's argument violated due process.

Finally, Gregory asserts that the State essentially argued facts not in evidence by claiming Gregory fit into the category of "the worst of the worst" without comparing the facts of his crime with other murders, especially those for which the defendant has been sentenced to death. This argument amounts to a claim of prosecutorial misconduct, and the defense failed to object to this argument. We cannot find the State's statement so flagrant and ill-intentioned that it created an enduring prejudice at the penalty phase. We conclude that trial court did not err in suppressing evidence of sentences imposed in other murder cases.

Prosecutorial Misconduct During Closing Argument

Gregory contends that during closing argument in the penalty phase the prosecutors committed misconduct in a number of ways. The same standards of review that apply to the guilt phase apply to the penalty phase in a capital case. *See State v. Davis*, 141 Wn.2d at 870-72. The defendant bears the burden of showing that the prosecutor's argument was both improper and prejudicial. Failure to object to a prosecutor's improper remark constitutes a waiver, unless the remark was "'so flagrant and ill intentioned that it evinces an enduring and resulting prejudice'" that could not have been cured by an instruction to the jury. *Id.* at 872 (quoting *Gentry*, 125 Wn.2d at 640). We also conduct a more searching review of penalty phase claims of error. *Lord*, 117 Wn.2d at 888. Procedural rules regarding arguments raised for the first time on appeal are construed more liberally in the sentencing phase of a death penalty case. *Id.* at 849.

Shifting Burden: Gregory argues that the prosecutor improperly shifted the burden of proof at the penalty phase and improperly commented on Gregory's failure to call certain witnesses. The court instructed the jury at the beginning of the penalty phase that in order to determine what sentence should be imposed, it must determine whether there are sufficient mitigating circumstances to merit leniency. A mitigating circumstance could be "any relevant fact about the defendant or the offense, which although not justifying or excusing the offense, suggests a reason for not imposing the death penalty." MRP at 7214. Gregory contends that the burden was shifted when the prosecutor emphasized the lack of mitigating evidence

presented by the mitigation specialist:

> [Y]ou can be certain, you can be certain, they put on everything they had and the very best that they had because there is no incentive to do anything else. So what you heard from the witness stand presented by the defense is the best that can be said about Allen Gregory. It's the best they can do as far as mitigating his conduct.
>
> They hired a mitigation specialist who testified yesterday and said he spent 200 hours working on this case. That's the equivalent of five 40-hour weeks without anything else interfering. They presented you with one police report [regarding an incident of child abuse Gregory suffered at the hands of his father].

MRP at 7726-27; *see also* RRP at 7640. The prosecutor also noted that a number of Gregory's family members did not testify and none of Gregory's middle school, high school, or Job Corps instructors testified on his behalf. On rebuttal, the prosecutor again stated:

> You know that they hired a mitigation expert to try to dig up anything they could [that was] positive to say about Allen Gregory, anything they could.
>
> . . . .
>
> And you can bet that they put on the very best and all the evidence they could scrape together that they thought could possibly mitigate his responsibility.

MRP at 7795-96. Defense counsel did not object to any of these remarks.

The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence. *Gentry*, 125 Wn.2d at 641. The State is entitled to comment upon quality and quantity of evidence presented by the defense. An argument about the amount or quality of evidence presented by the defense does not necessarily suggest that the burden of proof rests with the defense. *E.g.*, *People v. Boyette*, 29 Cal. 4th 381,

127 Cal. Rptr. 2d 544, 58 P.3d 391, 425 (2002) (holding in a capital case that argument commenting on the lack of corroboration for the defendant's story did not shift the burden of proof); *see also United States v. Lopez*, 803 F.2d 969, 973 (9th Cir. 1986), *cert. denied*, 481 U.S. 1030 (1987).

Gregory cites to two Washington cases in which arguably similar arguments were found to be improper. In *State v. Cleveland*, 58 Wn. App. 634, 648, 794 P.2d 546 (1990), the prosecutor commented on the skill of defense counsel stating "'you can bet your bottom dollar that Mr. Jones would not have overlooked any opportunity to present admissible, helpful evidence to you.'" *Id.* at 647. The *Cleveland* court held that the argument was improper because the inference was that Cleveland had a duty to present favorable evidence if it existed. *Id.* at 648. However, the jury was instructed that it could find that there was a reasonable doubt, even in the absence of defense evidence. *Id*. The court was "satisfied that the result in this case would have been the same had the portion of the closing argument objected to not been made." *Id.* at 649.

Gregory also points to *State v. Music*, a death penalty case in which the prosecutor commented in closing argument about the failure of the defense to present witnesses at the penalty phase to speak for the defendant. 79 Wn.2d 699, 716-17, 489 P.2d 159 (1971), *vacated pursuant to Music v. Washington*, 408 U.S. 940, 92 S. Ct. 2877, 33 L. Ed. 2d 764 (1972) (relying on *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)). The court was "convinced

beyond a reasonable doubt that with or without the remarks of the prosecutor the jury would have reached the same result." *Id.* at 718.

In this case, the prosecutor reminded the jury during his argument that the State had the burden of proof:

> The same presumption applies here: presumption of innocence at trial; presumption of a life sentence in this phase. The same party bears the burden of proof, the state. The same burden of proof applies, and that is proof beyond a reasonable doubt. It's not higher, and it's not lower.

MRP at 7713. The jury instructions at the penalty phase also reinforced the proper burden of proof. Given the proper instructions regarding burden, we conclude that even absent the remarks, the jury would have reached the same result.

Diminished Sense of Responsibility: Gregory contends that when the prosecutor said that Gregory would face "another court with another judge at a different time," MRP at 7739, he diminished the jurors' sense of responsibility for the death sentence by suggesting that the sentence would be reviewed on appeal. However, allegedly improper comments must be viewed in the context of the entire argument. *Gentry*, 125 Wn.2d at 640. In closing, the prosecutor discussed mercy:

> Religion plays a[n] important part [in] many of our lives. Faith plays an important part in many of our lives. The question is whether or not religious law should be held to take priority over the law the court just gave you. Each and every one of you told us, in your questionnaire and in your jury selection, that you did not have a religious belief that would interfere with your ability to apply the law, you didn't have a religious belief that said, "The death penalty is an inappropriate sentence in any and all occasion."
>
> *Whether or not the defendant faces another court with another judge at a different time and with a different standard, that's another question*. But mercy here has to be based on the evidence that's presented.

> The instruction that the court gave you says the appropriateness of the exercise of mercy may be considered. A mitigating circumstance is a fact which in fairness and mercy may be considered.

MRP at 7738-39 (emphasis added). There was no objection from defense counsel.

It is clear from the context surrounding the prosecutor's argument that he was referring to a religious interpretation of the concept of mercy. It seems highly unlikely that the jury would have interpreted this comment in any other way given the context surrounding it. While the defense claims that the comment about another court and another judge "switched gears" from a religion-based discussion of mercy to a discussion of the appellate process, the record belies this contention. Appellant's Reply Br. at 50. The discussion of mercy occurred both before and after the statement at issue. While Gregory cites to *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985) to support his argument, that case involved a clear argument that the jury's verdict would be automatically reviewable by the state supreme court. *Id.* at 325-26. We conclude that the comment here did not improperly diminish the jurors' responsibility.

Inflammatory Comments: Gregory contends that the prosecutor denigrated the defense and made other inflammatory comments. During closing argument, the prosecutor discussed and criticized what he anticipated would be the defense's arguments. The prosecutor stated:

> You should keep in mind that the defense only wants one of you to vote for life. It requires a unanimous verdict to impose the death penalty. Anything less is life without parole. It takes 12 to find a defendant not

> guilty, but it only takes 1 for a life sentence. The goal for the defense is not 12. The goal is just 1.

MRP at 7716. Defense counsel objected, arguing, "[t]he motivations of the defense is a personal comment on the argument," but the objection was overruled. *Id.* Then briefly in rebuttal, the prosecutor again referred to the defense counsel's wish for "one holdout." MRP at 7801.

Gregory contends that these comments amount to a personal attack on defense counsel. However, this court has noted that "the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." *Russell*, 125 Wn.2d at 87. Defense counsel, in both opening and closing remarks at the penalty phase, encouraged each juror at the beginning of deliberations to

> when you go back into this room here, I want you to stop, stop listening to the words in your head from me and the prosecutor or even your fellow jurors. Take a few moments to go off by yourself and look deep inside yourself, look at those things that you hold dear.

MRP at 7790. Defense counsel emphasized that every juror should decide for himself or herself what the penalty should be. The prosecutor's argument did not denigrate the defense, but merely responded to defense counsel's arguments.

In addition, Gregory argues that the prosecutor resorted to name calling, characterizing Gregory as "evil" and a "menace to society," MRP at 7796-97, which so infected the proceeding with unfairness that Gregory was denied due process. First, the prosecutor is entitled to draw inferences from the evidence and these inferences could have been justified given Gregory's criminal history and the

facts of this case. *See*, *e.g.*, *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 717, 101 P.3d 1 (2004); *Brown*, 132 Wn.2d at 568-69. Moreover, neither of these comments drew an objection from defense counsel and an instruction to the jury to disregard these brief characterizations could have neutralized any prejudice. Therefore, we decline to find that these comments denied Gregory due process.

Discussion of Prison Conditions and Possibility of Escape: The State made a motion in limine arguing that evidence at the penalty phase should be limited to the defendant's character, criminal record, and the circumstances of the crime. This argument was specifically targeted at preventing the introduction of evidence regarding prison conditions for prisoners sentenced to life without parole. The defense agreed. The trial court ordered that "[f]or purposes then of the penalty phase, . . . evidence not related to the defendant's character or criminal record or to any circumstances of the crime be inadmissible." MRP at 6895. In accordance with this ruling, the defense did not offer any evidence regarding prison conditions of those sentenced to life without parole. Then, in closing, the prosecutor argued:

> [C]onsider life without parole and whether or not it's as bleak as has been presented to you. Prison is just another form of society, albeit with guards and fences. But inside of the prison walls, the defendant will still be allowed to watch television, listen to the radio, listen to music, read the newspaper, read books and magazines. He will be allowed to go outside under the sun and sky, to exercise in an equipment room fully provided for him. When he is sick, he will go to the infirmary. When he is hungry, he will go to the commissary. He is allowed to have visits from his family and from his friends. He is allowed to have social interaction with the other people who are within the prison walls. All of those things are things [G.H.] doesn't have anymore.
>
> There is one other thing that a person who is incarcerated for life

> without parole can do, and that is escape. What incentive would the defendant have to conform his behavior to the rules of society inside of prison when he couldn't conform them and wouldn't conform them to the rules outside? If he breaks a law while he is in prison, tries to escape, gets in a fight, what are they going to do? Lock him up in prison? He is already there for life without parole.

MRP at 7721-22. Defense counsel did not object. In rebuttal, the prosecutor argued the possibility that Gregory could escape. Defense counsel objected based on "facts not in evidence," but the objection was overruled. MRP at 7799.

Defense counsel attempted to respond in his closing argument. He stated:

> Mr. Neeb wanted to suggest to you that life in prison is some sort of country club atmosphere. Well, he later exhorted you only to base your decision on the evidence that you have before you. You didn't hear anything about that it was a country club. Common sense will tell you a number of things about prison life.
>
> Life in prison without the possibility of parole is just that. It's life. Allen Gregory will die in prison. He will end his days behind concrete walls and iron bars and concertina wire. His life will be controlled from the time he is told to get up in the morning until he lays his head down on that prison-issued pillow at night. His life will be contained in a 9-by-7-foot cell lit by a single light bulb. And he will go to sleep at night listening to the lullabies of other men who are just waiting out the minutes and the hours and the days and the weeks and the years until old age and infirmity and death come to take them away.

MRP at 7753. Defense counsel later argued:

> Allen Gregory will be punished every time he wakes up in his cell and sees only bars and a single commode; every time he walks to the chow hall with the other men who have forfeited their right to be among us for the rest of their lives; every time his head hits that prison pillow and he has to think about what he has done, every minute of every hour of every day of every week of every month of every year for the rest of his life.

MRP at 7755.

Gregory now argues that the prosecutor's statements based on prison

conditions violated due process because they were based on facts not in evidence and the defense was unable to rebut the argument with his own evidence. It is clear that the prosecutor's argument at the very least violates the trial court's order excluding "any reference to the conditions that exist in prison." MCP 2788.

Whether the prosecutors' arguments amounted to reversible error is a close question. The fact that the State made the motion in limine and then blatantly violated the resulting order strongly suggests that the argument was flagrant and ill-intentioned. The characterization of prison life is central to the question of which sentence is appropriate, life without parole or death, suggesting also that the argument was prejudicial. However, without an objection from defense counsel, in order to find that prejudice resulted, we must also conclude that a curative instruction would not have been effective, a very difficult standard to meet.

Even so, this court has held that procedural rules regarding arguments raised for the first time on appeal are construed more liberally in the sentencing phase of a capital case. *Lord*, 117 Wn.2d at 849. Three factors weigh in favor of a finding of prosecutorial misconduct here. First, the violation of the trial court's order is blatant and the original motion in limine was targeted at preventing the defense from effectively responding to the prosecutor's argument.[45] Second, although defense

[45] The recent case cited by the dissent, *State v. McKenzie,* 157 Wn.2d 44, 134 P.3d 221 (2006), is distinguishable. First, that case did not implicate the more liberal application of procedural rules permitted in reviewing the sentencing phase of a capital case. Second, that case did not involve a situation where a prosecutor actively sought a ruling prohibiting discussion of a particular subject and then blatantly violated that ruling.

counsel attempted to paint a contrary picture of prison life, he was unable to introduce evidence to support his argument and his argument simply was not as compelling as the prosecutor's (perhaps because he did not expect to be allowed to make such an argument). Third, the images of Gregory watching television and lifting weights, when juxtaposed against the images of the crime scene, would be very difficult to overcome with an instruction. Again, these images would be central to the question of whether life without parole or death was the more appropriate sentence. Although this presents a close question, we conclude that the prosecutor's argument characterizing prison life amounted to prosecutorial misconduct that could not have been cured by an instruction.[46] The prosecutor's misconduct independently requires reversal of the death sentence.

D. Murder Case Conclusion

In sum, we find no reversible error in the guilt phase of Gregory's aggravated murder trial and thus uphold his conviction. Because we separately reverse his rape convictions, and evidence of those convictions was presented to the jury in the penalty phase of the aggravated murder trial, we reverse the death sentence. We also conclude that the prosecutor committed misconduct during closing argument of the penalty phase, an independent ground for reversing the death sentence. Because

[46] Gregory also asserts that the argument raising the risk of future escape was also improper. However, "'future dangerousness or the probable lack of future dangerousness of the defendant is a relevant factor for a jury's consideration'" at the penalty phase. *In re Pers. Restraint of Davis*, 152 Wn.2d at 704 (quoting *State v. Finch*, 137 Wn.2d 792, 864, 975 P.2d 967 (1999), *see also* RCW 10.95.070(8). Gregory fails to cite to any prohibition against the argument that future escape is a risk.

we reverse the death sentence there is no need to address either the constitutional arguments or the statutory review of the sentence.

III

Conclusion

We reverse Gregory's convictions for the rape of R.S. We affirm the aggravated first degree murder conviction for the murder of G.H., but we reverse the death sentence. We remand for resentencing in the murder case.

AUTHOR:
Justice Bobbe J. Bridge

WE CONCUR:
Chief Justice Gerry L. Alexander
Justice Tom Chambers
Justice Charles W. Johnson
Justice Susan Owens
Justice Barbara A. Madsen